Petition

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81-959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

AUDREY DAVIS SAXTON, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, For Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton Dennis,

Petitioner,

—v.—

FREDRICK H. DENNIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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QUESTION PRESENTED

Whether imposing a deference to the father's surname where children have used it since birth, in determining, pursuant to a statutory name change petition, whether to sanction the father's desire to have the children bear only his name, or the mother's and children's desire to have the children bear a surname bearing both parents' names separated by a hyphen, and saddling women with an impossible burden of proof to overcome the preference for the father's choice, denies women and children due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

	PAGE
Question presented.....	i
Table of Contents.....	ii
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction.....	3
Constitutional Provisions and Statutes Involved.....	3
Statement of the Case.....	5
Reasons For Granting the Writ....	9
Conclusion.....	40
Appendix	
Opinion and Judgment of the Supreme Court of Minnesota, August 21, 1981.....	1a
Order and Memorandum Opinion of District Court, Hennepin County, State of Minnesota, September 28, 1979.....	14a
Findings of Fact, Conclusions of Law and Order For Judgment, District Court, and Memorandum Opinion of Referee Thomas F. Haeg, Hennepin County, State of Minnesota, July 16, 1979.....	17a
Notice of Oral Argument From Supreme Court of Minnesota (undated).....	26a

Order Setting Oral Argument
For December, 1980 Calendar
By Supreme Court of Minnesota,
October 24, 1980..... 27a

Order Denying Oral Argument
By Supreme Court of Minnesota,
May 1, 1980..... 28a

Prehearing Conference Order of
Supreme Court of Minnesota,
January 21, 1980..... 29a

Affidavit of Audrey Davis
Saxton in Support of Her
Petition For Statutory Change
of Name, April, 1979..... 31a

Affidavit of Fredrick H. Dennis
Opposing Petitioner's Petition,
May 28, 1979..... 34a

Motion of Petitioner For
Reconsideration of Oral Argument
(undated)..... 39a

Affidavit of Audrey Davis
Saxton in Support of Oral
Argument, May 12, 1980..... 41a

Motion of Respondent in
Opposition To Oral Argument(undated). 46a

Affidavit of Respondent's Counsel
in Support of Motion Opposing
Oral Argument (undated)..... 48a

Letter From Rochester, Minnesota
Chapter, National Organization
For Women in Support of Oral
Argument, May 11, 1980..... 50a

MacDougall, "Women's Name Rights,"
The Spokeswoman, August, 1981..... 52a

TABLE OF AUTHORITIES

CASES	PAGE
Alabama v. Taylor, No. 80-492 (Ala. Sup. Ct. pending).....	21
Allen v. Lovejoy, 533 F. 2d 522 (6th Cir. 1977).....	22
Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).....	33
Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977).....	22
In re Banks, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (1974).	22
Caban v. Mohammed, 441 U.S. 380 (1979).....	34
Califano v. Goldfarb, 430 U.S. 199 (1977).....	34
Califano v. Westcott, 443 U.S. 76 (1979).....	34
Carey v. Population Services International, 431 U.S. 678 (1977).....	38
Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).	38,39
Craig v. Boren, 429 U.S. 190 (1976).....	34

Davis v. Roos, 326 So. 2d 226 (Fla. App. 1976)..... 22
Devine v. Devine, ___Ala.___, 398 So. 2d 686 (1981).....26,39
Dike v. School Board of Orange County, 650 F. 2d 783 (5th Cir. 1981)..... 38
Doe v. Dunning, 87 Wash. 2d 50, 549 P. 2d 1 (1976)..... 28
Donald J. v. Evna M.-W., 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978)..... 22
Dunn v. Palermo, 522 S.W. 2d 679 (Tenn. 1975)..... 23
Eisenstadt v. Baird, 405 U.S. 438 (1972)..... 38
In re Erickson, 547 S.W. 2d 357 (Tex. Civ. App. 1977)..... 23
Firman v. Firman, ___Mont.___, 610 P. 2d 178 (1980)..... 27
Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. mem., 405 U.S. 970 (1972).....21,22
Griswold v. Connecticut, 381 U.S. 479 (1965)..... 38
In re Harris, ___W.Va.___, 236 S.E. 2d 426 (1977)..... 6,27
Jacobs v. Jacobs, ___Minn.___, 309 N.W. 2d 303 (1981).....24,25
Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979).....17,33 27,38 22,23

Jones v. McDowell, ___N.C. App., 281 S.E. 2d 192 (1981)..... 22,38

Kirchberg v. Feenstra, 101 S.Ct. 1195(1981)..... 30,34

Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W. 2d 458, 67 A.L.R. 3d 1249 (1975)..... 23

Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277 (1975)..... 12,13,22 32,36

In re Lawrence, 133 N.J. Super. 408, 337 A. 2d 49 (1975)..... 22

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 38

In re Natale, 527 S.W. 2d 402 (Mo. App. 1975)..... 22

O'Brien v. Tilson, ___F. Supp. ___ (D.C.N.C. 1981)..... 25,27,38 22,23

Ogle v. Circuit Court, 227 N.W. 2d 227 N.W. 2d 621 (S.D. 1975)... 23

Orr v. Orr, 440 U.S. 268 (1979).. 34

Personnel Administrator v. Feeney, 442 U.S. 256 (1979)..... 33

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 38

Prince v. Mass., 321 U.S. 158 (1944) 38

Reed v. Reed, 404 U.S. 71 (1971)... 30

Rice v. Dept. of Health and Reh. Services, 386 So. 2d 844 (Fla. App. 1980)..... 24,27

Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974)..... 12,17,25
Roe v. Conn, 417 F. Supp. 769 (M.D.Ala. 1976)..... 22
Roe v. Wade, 410 U.S. 113 (1973)..... 3 38
In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980)..... 22,24,27
Sec. of the Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 366 N.E. 2d 717 (1977)... 22,27
Simmons v. O'Brien, 210 Neb. 778, 272 N.W. 2d 273 (1978)..... 22
Smith v. Organization of Foster Families, 431 816 (1977)..... 3
Stanton v. Stanton, 421 U.S. 7 (1975)..... 34
Stuart v. Board of Supervisors, 266 Md. 440, 295 A. 2d 223 (1972)..... 22
Traugott v. Petit, ___R.I.___, 404 A. 2d 77 (1979)..... 23
Turner v. Dept. of Employment Security, 423 U.S. 44 (1975).. 39
Washington v. Davis, 426 U.S. 229 (1976)..... 33
Webber v. Parker, 167 So. 2d 519, writ refused, 264 La. 886, 168 So. 2d 269 (1964)..... 36

Weinberger v. Weisenfeld, 420 636 (1975)..... 34
Wengler v. Druggists Mutual Ins. Co., 100 S. Ct. 1540 (1980)... 34
Whitlow v. Hodges, 539 F. 2d 582 (6th Cir.), cert. denied, 429 U.S. 1029 (1976)..... 21,22
Yellow Springs v. Ohio High School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978).... 39
Zablocki v. Redhail, 434 U.S. 374 (1978)..... 38

CONSTITUTIONAL PROVISION

United States Constitution,
Amendment XIV..... 3

FEDERAL STATUTE

28 U.S.C. § 1257 (3)..... 3

STATE STATUTES

Minn. Stat. § 259.10 (1980)..... 3

Minn. Stat. § 259.11 (1980)..... 3

Minn. Stat. § 517.071 (1975)..... 24

Minn. Stat. § 517.08 (1980)..... 24

Pa. Stat. Ann., Tit. 28,
Sec. 1.7 (1975)..... 36

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Alaska Op. Att'y. Gen., May 5, 1976.. 27

Conn. Op. Att'y. Gen., Jan. 23,
1975..... 27

Fla. Op. Att'y. Gen., Dec. 21,
1976..... 27

Ga. Op. Att'y. Gen., Oct. 21,
1976..... 27

Me. Op. Att'y. Gen.,
April 4, 1978..... 26

Me. Op. Att'y. Gen.,
March 22, 1977..... 27

Me. Op. Att'y. Gen., Aug. 18, 1976..... 28

Md. Op. Att'y. Gen., Nov. 9, 1978..... 28

Mass. Op. Att'y. Gen., Jan. 24, 1974..... 28

Mich. Op. Att'y. Gen., April 14, 1980..... 28

Vt. Op. Att'y. Gen., March 10, 1975..... 28

Wis. Op. Att'y. Gen., Jan. 31, 1977..... 28

Wis. Op. Att'y. Gen., Oct. 7, 1974..... 28

Books and Studies

Center For A Woman's Own Name, Booklet For Women Who Wish To Determine Their Own Names After Marriage (1974) and 1975 Supplement..... 21, 25

Ontario Law Reform Commission, Report On Changes of Name (1976)..... 29

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Comment, "The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and The Child's Best Interests," 1979 Utah L. Rev. 303..... 26

Comment, "Surname Alternatives in Pennsylvania," 82 Dickinson L. Rev. 101 (1977)..... 25

Comment, "The Constitutionality of Requiring Use of Husband's Name in Driver's License: Whitlow v. Hodges," 38 Ohio St. L.J. 157 (1977)..... 25

Comment, "Married Women and The Name Game," 11 U. Rich. L. Rev. 121 (1976)..... 25

Comment, "Statutory Development-Pre-Marriage Name Change, Presumption, and Reregistration Statutes, 74 Col. L. Rev. 1508 (1974)..... 25

Notes, "Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney," 79 Col.L. Rev. 1376 (1979)..... 36

Note, "Change of Child's Name," The L.Q. Rev. 197 (1981)..... 29

Note," Recording of Surnames-Clerks Have No Authority To Inhibit The Rights of Individuals To Choose Their Own and Their Children's Surnames," 13 New Eng. L. Rev. 588 (1978)..... 29

Annotation, "Rights and Remedies of Parents Inter Se With Respect To The Names of Their Children," 92 A.L.R. 3d 1091 (1979).....24,28

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

Audrey Davis Saxton, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, for Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Petitioner,

-v.-

Fredrick H. Dennis,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF MINNESOTA

Petitioner, Audrey Davis Saxton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Court entered in this proceeding on August 21, 1981.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported at 309 N.W. 2d 298 (1981); it is set forth in the Appendix, infra, at pp. 1a-13a. The orders and opinion of the District Court of Hennepin County, State of Minnesota dated Setember 28, 1979 were not officially reported; they are set forth in the Appendix, infra, at pp. 14a-16a. The findings of fact, conclusions of law, and order for judgment of the District for Hennepin County, Minnesota, and the memorandum opinion of Referee Thomas F. Haeg dated July 16, 1979 are not officially reported; they are set forth in the Appendix, infra, at pp. 17a-25a.

Orders of the Supreme Court of Minnesota first denying and then granting oral argument in the case before that Court are not officially reported; they are set forth in the Appendix, infra, at pp.26a-30a.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on August 21, 1981. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution, Amendment XIV reads, in pertinent part:

> "...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 259. 10 of the Minnesota Statutes (1980) reads:

> "A person who shall have resided in any county for one year may apply to the district court thereof to have his name, the names of his minor children, if any, and the name of his spouse, if the spouse joins in the application, changed in the manner herein specified. He shall state in his application the name and age of his spouse and each of his children, if any, and shall describe all lands in the state in or upon which he, his children and his spouse if their names are also to be changed by the application, claim any interest or lien, and shall appear personally before the

court and prove his identity by at least two witnesses. If he be a minor, the application shall be made by his guardian or next of kin. Every person who, with intent to defraud, shall make a false statement in any such application shall be guilty of a misdemeanor provided, however, that no minor child's name may be changed without both of his parents having notice of the pending of the application for change of name, whenever practicable, as determined by the court."

Section 259.11 of the Minnesota Statutes (1980) reads:

"Upon meeting the requirements of section 259.10, the court shall grant the application unless it finds that there is an intent to defraud or mislead or in the case of the change of a minor child's name, the court finds that such name change is not in the best interests of the child."

STATEMENT OF THE CASE

Audrey Davis Saxton is the custodial mother of two minor children, Robert Lynwood Dennis and Jessica Campbell Dennis. In 1979 she petitioned the District Court in Hennepin County, Minnesota, on behalf of her children, for a statutory name change pursuant to Minn. Stat. §§ 259.10 and 259.11 (1980) soas to add her surname, Saxton, to the children's birth given surname, Dennis, the surname of her ex-husband and the children's father.

In her affidavit in support of the petition (31a), Ms. Saxton stated that the name addition was the joint wish of her and the children, that it had been discussed among them for over a year, that she believed it to be in their best interests and "that she and her children would like to now be united in name as an outward and visible sign of their family unit." (32a)

Ms. Saxton had been married to the respondent Fredrick H. Dennis for a period of several years and had divorced him in West Virginia in 1975 when the children were six and four years old. She moved with her children to Minneapolis after the divorce, reverted to her own name[1] and

established a family unit with her two children. The children's father also moved and now lives in North Carolina. The children visit him regularly and no issue of parental misconduct has been raised by Ms. Saxton although there was a dispute with reference to the actual financial status of Mr. Dennis as he represented it in his affidavit opposing the petition for the statutory name change. (34a; 41a; Tr.6, 14).

Ms. Saxton had changed her name when she married Mr. Dennis in the 1960's thinking she had no choice not to (Tr.11).

Ms. Saxton brought the petition after telephoning her ex-husband about it and his approving of it (Tr. 16) saying that "he would get a letter in the mail saying that he would support this name change." (Tr. 16). Mr. Dennis withdrew his accordance with the idea and opposed the petition. He filed an affidavit in opposition to the same (34a).

---

1 West Virginia in 1975 was one of three states which gave no jurisdiction to divorce courts to change the names of divorcing women with children in their custody. Two years after Ms. Saxton moved from that state the Supreme Court ruled that the general name change statute was available to divorced women with children. In re Harris, ___W.Va.___. 236 S.E. 2d 426 (1977).

In his affidavit the father stated that "it would be adverse to the best interests and welfare of my children to grant the relief sought by Petitioner" and that "my son, Robert Lynwood Dennis, is the only male heir of the Dennis surname, as I am an only child and my father is an only child." (36a).

A hearing was held before the Special Term Referee in the District Court on June 8, 1979. Ms. Saxton appeared with her children and without counsel. Her ex-husband did not appear personally, but was represented by counsel.

At the hearing the Referee refused to let Ms. Saxton speak about the wishes of her children respecting the proposed hyphenated surname on the grounds that it would be hearsay (Tr. 7). Nor would he let the children testify or be examined to determine if they were capable of testifying (Tr.7) although he asked them to be identified as present. Ms.Saxton made a general statement, part of which was later quoted by the Supreme Court of Minnesota. She said in part:

> "...I believe that it is in my children's best interest that they acquire my name hyphenated to their father's name as representing our family unit. I feel that the children and I have come emotionally a long

> distance from the feeling of being a broken family to the feeling of being a full family. The family unity is symbolically by name and law. If solely with their father's name, I think this is damaging to my children. I feel that they want their name to be Saxton hyphen Dennis as reflecting our wholeness. I think that the idea of a broken home is especially significant because that has been an image of children of divorced parents, that they are now children of a broken home. I think that may have been true for us at the time that we were abandoned by their father. I think that since that time that we have grown and achieved a position of being a whole family..." (Tr. 5).
>
> "...since the divorce, which was in 1975, I changed my name back to my maiden name, Saxton, and we are coming now to ask you to add my name to theirs so that will reflect their dual parentage and reflect the family unit, the Saxton family unit that we have established here in Minnesota after four years." (Tr. 3).

Through cross examination by her ex-husband's attorney Ms. Saxton was able briefly to mention how the name addition idea came about (Tr. 15-16), that it had been her son Robert's idea from the fact that both names were on the family mailbox. Discussion about the addition ensued over a period of two years.

The Court then questioned Ms. Saxton about her ex-husband's behavior towards

the children and asked her what she would do if she were to remarry. "I will never change my name again" she responded. (Tr. 19).

Ms. Saxton then called two witnesses, John Baudhuin, assistant to the rector at the St. John's Episcopal Church in Minneapolis where the Saxton-Dennis family had attended since they came to Minneapolis. Although she had difficulty interrogating the witness as a non-attorney over the objections of counsel (Tr. 23-28), Ms. Saxton asked him about his association with the children and what he knew and thought about the proposed name addition. He stated in part:

> "I guess I would say first of all that we have sort of an ideal about families, and that somehow there should be two parents and kind of ideal, one family. In this case, that is obviously no longer a reality as a divorce statement very well points out, and, at the same time, I think that whatever kind of family situation exists, it's really important that everybody feel as good as they possibly can about it, and one thing that I think outlines a family very well is a name...What I am saying is that we have in this case a very real matter of, in a sense, two families, both of them needing their own name, and it just seems to me that being incredibly wise things--this, again, is my own opinion, that both parents in this dual-family system have some representation, and I know in talking a

little bit with the children about this, particularly with Robert, there is a great deal of excitement about that being able to assert his dual parenthood with this addition to his name. I feel that it's in the best interest of the children. In this particular case I have observed what's happened to these children and other children in the parish when other children are addressing them and saying, well, your mother's name is Audrey Saxton and you are Robert Dennis, that doesn't make any sense to me, why aren't you the same name as her, and I can see an incredible benefit to these children when they are able to say, I am both these names, and both these people are important in my life...

The kind of thing that we are talking about could be viewed, I suppose, as a very trivial matter, but I think to these people it seems to be very important, and I was glad to share in some of the excitement, particularly Robert, as he was dashing up and down out here about adding something to his name which would more fully reflect his identity. Those are the kinds of things that I think are important in this issue, and that's why I am advocating that they have some kind of outward and visible sign to represent their dual parentage." (Tr.25-28).

Under cross examination by the father's counsel the witness said that he saw the children "reasonably well adjusted as can be expected under the situation. I would see this addition to their name as something that would really help bring some closure to the whole divorce issue." (Tr. 29).

Ms. Saxton called one other witness, Seymour Z. Gross, the director of the Pilot City Mental Health Center in North Minneapolis and a clinical psychologist. Again over numerous objections (Tr. 31-34) he testified about his evaluation of the children which he made for the purpose of the hearing at the request of Ms. Saxton. He testified about his meeting, being told how the father had at first agreed with the name change and then changed his mind, that the children feel very strongly about the name change. He testified to their telling him about how Robert thought up the idea. (Tr. 35-36). He conluded his direct statement by saying that "the name change would enhance their self image, their feelings about themselves and it need not be that they have had problems associated by not having a change, but that this is an affirmative or positive step of enhancing themselves." (Tr. 37). Under cross examination about whether the children would be likely to change their minds after visiting their father he stated "Well, the first question is, if it's possible. I think, yes, it is possible, it could. I would tend to think, though, that it would not change, that they

would come back after six weeks and still maintain their interest in having the name change." (Tr. 40).

The children's father called no witnesses, his affidavit being his only testimony.

On the basis of the record the Referee drafted a memorandum denying the petition which was signed as an order by the Court (17a). He wrote, following the earlier Minnesota Supreme Court case of Robinson v. Hansel, 302 Minn. 342, 223 N.W. 2d 138 (1974) that Robinson v. Hansel

> "has interpreted the [name change] statute by holding, in part, that the father has an interest, or 'inherent concern,' in having his child bear his surname. The Court came to this conclusion by giving deference to the custom of patronymic identification..." (emphasis added) (21a).

The Referee concluded that the children "are not, at this time, of such sufficient age and maturity to make a discreet decision in this respect."

The Referee dismissed Ms. Saxton's contention that she had a right to participate in the naming of her children and that failure to let the children carry on her name established a classification based on sex contrary to the Constitution. Citing Laks v. Laks , 25 Ariz. App. 58, 540 P. 2d 1277 (1975)

the Referee wrote that "the Court is not so much imposing patriarchal custom and tradition upon the children, but, rather, securing and maintaining the parent's understanding and agreement when they first named their children at birth." (24a).

Ms. Saxton appealed to the District Court to review the Findings and Order of the Referee which had been confirmed by the court on July 16, 1979. Ms. Saxton obtained counsel for the appeal and raised again the issue of her feelings about her rearing her family, the best interests of her children, and her constitutional right to name her children on at least the same basis as their father. The Court affirmed the Referee's judgment, stating that:

> "It is not a question of imposing patriarchal custom and tradition on the children, because the court is not being asked to determine the child's initial name...The court is being asked to create a name for these children which is different from either their mother's or father's surname, and the petitioner has failed to meet her burden of proof that the children's best interests will be served by such a name. Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277 (1975) (16a).

Petitioner appealed to the Minnesota Supreme Court.

Petitioner argued that the record did establish that the hyphenated surname would be in the children's best interests; that the children's constitutional rights to names in their best interests were violated by the imposition of a mandatory requirement that the father's name must be maintained by them if the father merely objected; that denying a custodial mother the right to name her children on at least an equal basis as a noncustodial father is a discrimination based on gender and unconstitutional; that the preference for the father's wishes because he wants his only "male heir" to carry his name violated the mother's and children's constitutional rights and reinforces sex stereotypes and sex discriminatory naming customs, in violation of the Constitution; that the impossible burden of proof imposed on the mother imposed a constitutionally impermissible gender classification; and that the imposition of the father's name alone on the children irrespective of their actual best interests unconstitutionally interferred with the mother's parental rights in rearing her children.

Petitioner then sought oral argument before the Supreme Court of Minnesota. As part of a Prehearing Conference Order the Court had recommended that there be no oral argument in the case (29a). Respondent moved the Court to affirm the order based in part on financial grounds, according to the motion (46a). The Court denied oral argument, referring to appellant's motion for the same, on May 1, 1980 (28a). Petitioner then moved for a reconsideration of the denial of argument (39a) and accompanied the motion with an affidavit detailing her financial situation since her husband had left her and the children, including her costs of procurring a college degree and of her pending graduate studies, and the specifics of the assets of the marriage and divorce settlement (41a).

The Rochester, Minnesota chapter of the National Organization For Women, stating

that it had been interested in women's name rights for a long while wrote a letter to the Court in support of the argument, urging the Court to recognize the importance of the case state and nation wide (50a):

> "Cases are being brought to insure the right of women to have equal say in naming their children at this state [after divorce with children in the mother's custody], consistent with the children's best interest, as well as at birth." (50a).

The Supreme Court of Minnesota granted oral argument and notified counsel of the same by postcard (26a). It later changed the date upon application of the respondent (27a). Oral argument was held on December 1, 1980. On August 21, 1981 the Supreme Court affirmed the lower courts in ruling against the petition, specifically denying without discussion all of Petitioner's constitutional arguments and ruling that the failure to listen to the children was error, but harmless.

The Court, in a companion case, Jacobs v. Jacobs, 309 N.W. 2d 303 (1981) for the first time stated that at birth neither parent has a superior naming right over a child, and cited the same in ruling against Ms. Saxton. "Due deference is given, however, to the fact the child has borne a given surname for an extended period of time." (10a).

Two justices dissented. Justice Wahl stated that the burden of proof established by Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974) and followed in instant case should not be applicable in a situation such as here where the mother seeks to add her name, not obliterate the father's name.

> "The mother's interest in having her children bear and perpetuate her surname should be recognized as co-extensive with the father's interest, as are other parental rights and responsibilities, such as custody and support." (12a)

Petitioner seeks to have this Court review the substantial federal Constitutional questions involved in this typical situation of a divorced mother with children in her custody seeking to rear her children consistent with their best interests without impermissible and sex discriminatory interference imposed on her right to do so.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the issue of a woman's right to name her children in her custody on at least an equal basis as the children's father is arising continuously throughout the nation

This issue in this case--the right of a divorced mother who has been awarded custody of her children, to determine the children's surnames on at least an equal basis with the divorced, non-custodial father--is a logical outgrowth of the efforts of early American and English feminists to secure the right of women to determine their own names irrespective of their marital status.

The first such efforts centered around the right of married women to retain their "maiden" names after they married. Calling upon the common law right to the name of her choice, Lucy Stone, one of the principal leaders of the nineteenth century feminist movement, retained her pre-marriage surname for all social and legal purposes when she married Henry B. Blackwell in 1855.

Strong prejudices faced twentieth century women from governmental officials and society. In 1921 the Lucy Stone League was founded in New York. With the National Woman's Party, represented

by Burnita Shelton Matthews, future judge of the District of Columbia District Court, they successfully argued their common law right to their own surnames in a test case before the Passport office in 1925.

In the early 1970's modern day women were seen to retain their names at marriage in like fashion to their ancestors. In like fashion they met with incredible societal and governmental resistance.[2] A spate of litigation ensued over the right of married women who simply did not change their names at marriage to vote, run for office, drive, attend educational institutions or obtain professional licenses or employment, and on and on, in their own surnames. Women had to seek legal redress to have their birth surnames recognized as middle names such as in Michigan where the Secretary of State finally and reluctantly recognized women's middle name choice in 1973.[3]

The amount of attention the issue of women's right to their names has been given is greater since the early 1970's than in all the decades before, including the nineteenth century. For a detailed outline of the litigation, legal commentary and authority on the rights of women to determine their own names and those of their children, see MacDougall, "Women's, Men's and Children's

Names: An Outline and Bibliography," 7 Family Law Reporter (B.N.A.) 4013-3018 (March 17, 1981).[4] A summary of the law of names and the earlier efforts to secure the rights of women to their own names at the beginning of the 1970's is in MacDougall, "Married Women's Common Law Right To Their Own Surnames," 1 Women's Rights Law Reporter 2 (Fall/Winter, 1972/1973).

The fact that women did not have to relinguish their birth given surnames as last or middle names was not known to many in the early 70's when litigation began with Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. mem., 405 U.S. 970 (1972). There is still misunderstanding on the issue. The Alabama Supreme Court from which state Forbush arose is currently considering the issue of name retention in Alabama v. Taylor, No. 80-492, and except for Whitlow v. Hodges, 539 F. 2d 582 (6th Cir.), cert. denied, 429 U.S. 1029 (1976) there is no judicial obstacle to retaining one's name at marriage.

The fact remains, however, that this Court has not given a woman's right to

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[2] See Center For A Woman's Own Name, Booklet For Women Who Wish To Determine Their Own Names After Marriage(1974) and 1975 Supplement;"Bibliography of Historical News Sources," (1974)

[3] Id., at 27.

use her own name constitutional protection. The two times it had the opportunity, it did not, summarily affirming in Forbush v. Wallace, supra, and denying certiorari in Whitlow v. Hodges, supra. While the right is now recognized in virtually every state in the country, in the early 70's before the blossoming of litigation, state attorney general opinions, and legislation, name retention at marriage was not the norm and those women who deviated from the custom of automatically taking their husbands names encountered obstacles from all quarters.[6]

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[4] See, e.g., Allen v. Lovejoy, 533 F. 2d 522 (6th Cir. 1977); O'Brien v. Tilson, ___ F. Supp. ___ (D.C.N.C. 1981); Jech v. Burch, 466 F. Supp. 714 (D. Hawaii 1979); Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976); Laks v. Laks, 25 Ariz App. 58, 540 P. 2d 1277 (1975); In re Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Rptr. 918 (1980); Donald J. v. Evna M.-W., 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978); In re Banks, 42 Cal. App. 3d 631, 117 Cal. Rptr. 37 (1974); Davis v. Roos, 326 So. 2d 226 (Fla. App. 1976); Stuart v. Board of Supervisors, 266 Md. 440, 295 A. 2d 223 (1972); Sec. of Commonwealth v. City Clerk of Lowell, 373 Mass. 178, 366 N.E. 2d 717 (1977); In re Natale, 527 S.W. 2d 402 (Mo. App. 1975); Simmons v. O'Brien, 201 Neb. 778, 272 N.W. 2d 273 (1978); In re Lawrence, 133 N.J. Super. 408, 337 A. 2d 49 (1975); Jones

It was in this era or before that women such as Audrey Davis Saxton married. As she testified, she did not know that she had the choice to retain her name at marriage. While there is no official account of the numbers of women who retain their surnames at marriage today, the number is still small in comparison to that of women who change their names. The courts now assume the right and growing custom,[7] but it cannot be assumed even today with all the information that the average young couple knows its options.[8] Less so do they likely know that they may name their children as they please. It was only recently that the Hawaiian statute requiring newborns of married parents to bear their fathers' surnames as theirs on their birth certicates, in Jech v. Burch, supra, and only last month that a similar North Carolina statute was declared unconstitutional, by O'Brien v. Tilson, supra. The last remaining statute[9] to invalidate with respect to naming children of married

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4(continued)
v. McDowell, ___N.C. App.___, 281 S.E. 2d 192 (1981);Ogle v. Circuit Court, 227 N.W. 2d 621 (S.D. 1975); Traugott v. Petit, ___R.I.___, 404 A. 2d 77 (1979); Dunn v. Palermo, 522 S.W. 2d 679 (Tenn. 1975); In re Erickson, 547 S.W. 2d 357 (Tex. Civ. App. 1977); In re Harris, supra; Kruzel v. Podell,67 Wis. 2d

parents, in Florida, has been partially challenged soas at least to accommodate a hyphenated surname of both parents as fulfilling the requirement of the statute that the child be given the father's name. Rice v. Dept. of Health and Rehabilitative Services, 386 So. 2d 844 (Fla. App. 1980).

In other states parents' efforts to name their children pursuant to their wishes has met with resistance, but in every case the right of agreeing parents has been upheld.[10]

The arena has only recently shifted at the appellate level to disagreeing parents at birth in situations where the parents are divorced or divorcing. Jacobs v. Jacobs, supra, was only the second case of a state's highest court to rule on that issue. The first was California, in In re Schiffman, supra. Unlike California's

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4 (continued)
138, 226 N.W. 2d 458, 67 A.L.R. 3d 1249 (1975) Minn. Stat. § 517. 071 (1975); Minn. Stat. 517.08(1980)(name retention at marriage).

5 See, e.g., Bysiewicz and MacDonnell, "Married Women's Surnames," 5 Conn. L. Rev. 598 (1973); Daum, "The Right of Married Women To Assert Their Own Surnames," 8 U. Mich. J.L.Ref. 63 (1974); Lamber, "A Married Woman's Surname: Is Custom Law?" 1973 Wash. U.L.Q. 779 (1973); MacDougall, supra; Comment, "Surname Alternatives in

high court, however, Minnesota did not, in Jacobs v. Jacobs, overrule the type of precedent presented by Robinson v. Hansel, supra, which recognized an inherent right of a father to have children bear his name above all others. Thus even with the small advance in the law Jacobs provides, it is little assurance of free and equal choice for a custodial mother even at the birth of her child.

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5 (continued)
Pennsylvania," 82 Dickinson L. Rev. 101 (1977); Comment, "The Constitutionality of Requiring Use of Husband's Name in Driver's License: Whitlow v. Hodges," 38 Ohio St. L.J. 157 (1977); Comment, "Statutory Development--Pre-Marriage Name Change, Presumption, and Reregistration Statutes, 74 Col. L. Rev. 1508 (1974).

6 Center For A Woman's Own Name, Booklet, supra, and 1975 Supplement; Beckmann, "What's In A Name? An Identity, They Claim," et seq. (four part series), The Capital Times, July 30, 1973-August 2, 1973. "Sorry so few thought of it twenty years ago," commented Ruth Bader Ginsburg in 1973 in reaction to the pressures women were experiencing in exercising their right to use their own names.

7 See, e.g., O'Brien v. Tilson, supra.

8 Two state attorneys general have issued opinions to the effect that men can change their names at marriage to their wives' names consistent with the common law of names.

With the right of women to use their own names essentially recognized everywhere, women are, as the National Organization For Women chapter wrote the Minnesota Supreme Court, being faced with the situation of children in their custody who were named at birth when women did not even know their own options of retaining their birth given names. Divorce is common. There are no reported cases to the knowledge of Petitioner which involve a man's trying to change the name of his marital child given its mother's name at birth when he has custody of the child. [11] Nor is there any such case when the man does not have custody of the child. Custody has traditionally been awarded to mothers. It is all but universally accepted that any presumption in favor of one parent for custody is a violation of equal protection and due process. See Devine v. Devine, ___Ala. ___, 398 So. 2d 686 (1981) for a thorough discussion of the "tender years" doctrine and its demise.

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8 (continued)
Mich. Op. Att'y. Gen., April 14, 1980; Me. Op. Att'y. Gen., April 4, 1978.

[9] See Comment, "The Controversy Over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests," 1979 Utah L. Rev. 303 for a mostly accurate summary of state children's names statutes and a

With courts using the traditional way of looking at children's names[12] without a thorough review of the federal questions involved in the complexities of weighing the interests involved, state courts will continue to render decisions such as the California Supreme Court overruled in In re Schiffman, supra, like Montana did in a case where a woman was unrepresented by counsel recently, Firman v. Firman, ___Mont. ___, 610 P. 2d 178 (1980). See In re Harris, supra, and the cases cited in MacDougall, "Women's Men's, Children's Names: An Outline and Bibliography," supra. Lower courts need guidance, and state appellate courts need a thorough review to effectuate their role in administering a constitutional method for determining this most common of disputes in the 1980's.

9(continued)
a discussion of many of the issues in this area prior to Jech v. Burch, supra.

10 Rice v. Dept. of Health and Rehab. Services, supra; Jech v. Burch, supra; Sec. of Commonwealth v. City Clerk of Lowell, O'Brien v. Tilson, supra; Alaska Op. Att'y. Gen., May 5, 1976; Conn. Op. Att'y. Gen., Jan. 23, 1975; Fla. Op. Att'y. Gen., Dec. 21, 1976; Ga. Op. Att'y. Gen., Oct. 21, 1976; Me. Op. Att'y. Gen., March 22, 1977;

This fact situation before the Court in this case is the one most likely to come before the courts with frequency as women, like Ms. Saxton, knowing now that they can use their own surnames, do not change their names when they remarry, if they remarry, and seek the right as custodial parents to name their children with their names in some manner. Where parents agree, litigation does not ensue once the state recognizes the absence of a requirement that its citizens bear certain defined names.[13] It is at this state of friction, where a divorce has occurred, the mother has reverted to her own name, the mother has custody and the father objects to his children bearing anything but his name, that litigation is occurring and for which the country needs guidance.

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10 (continued)
Me. Op. Att'y. Gen., Aug. 18, 1976; Md. Op. Att'y. Gen., Nov. 9, 1978; Mass. Op. Att'y. Gen., Jan. 24, 1974; Mich. Op. Att'y. Gen., supra; Vt. Op. Att'y. Gen., March 10, 1975; Wis. Op. Att'y. Gen., Jan. 31, 1977; Wis. Op. Att'y. Gen., Oct. 7, 1974.

11
The cases traditionally involve a change to a stepfather's name which the mother has adopted as her own, rarely as change to the mother's name and then in situations where she has not remarried. See "Rights and Remedies of Parents Inter Se With Respect To The Names of Their Children," 92 A.L.R. 3d 1091 (1971). See Doe v. Dunning, 87 Wash. 2d 50, 549 P. 2d 1 (1976)(discussion of naming children at birth with mother's name).

Therefore, the time is appropriate for a thorough review of the constitutional issues in order to prevent duplicate cases from arising and to relieve tension among and between the state and federal courts.

12

Id.

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See Note, "Recording of Surnames--Clerks Have No Authority To Inhibit The Rights of Individuals To Choose Their Own and Their Children's Surnames," 13 New Eng. L. Rev. 588 (1978).

14

See Ellis, "The Choice of Children's Surnames," 9 Anglo-Amer. Rev. 92 (Jan./March 1980); MacDougall, "Women's Name Rights," The Spokeswoman, August, 1981 (reproduced in Appendix, 52 a); Ontario Law Reform Commission, Reports On Changes of Name (1976); Spitzer, "Wives, Babies, Names and the Common Law," 4 Wash. St. Bar News 4 (Dec. 1973); Note, "Change of Child's Name," The L.Q. Rev. 197 (1981). For a proposal for a different naming system, see Lane, L. "Equal Names For Equal Sexes, A Proposal for Male Surnames: Matrilineal and Patrilineal Equality," (1974)

II.

Certiorari should be granted because the imposition of a preference for fathers over mothers in naming their marital children simply because the children were initially given the male surname at birth conflicts with the rulings of this Court in decisions from Reed v. Reed, 404 U.S. 71 (1971) through the Court's decisions last term including Kirchberg v. Feenstra, 101 S. Ct. 1195 (1981) prohibiting gender based discrimination

The affidavit of the father in this case, objecting to the statutory change of name petition to add his son's mother's name to his present name which is identical with his, states that his son is his "only male heir of the Dennis surname, as I am an only child and my father is an only child." (36a). Although the petition for a hyphenated surname was brought on behalf of the father's daughter, he did not raise the issue of carrying on his name with respect to her. In his affidavit the father with the full expectation that his desires to perpetuate his name were both valid and to be effectuated through the usual patrynomic naming system, i.e. by his son's bestowing it on any ("legitimate") offspring he may have, articulated the very type of stereotypes about men and women's roles that it has been invalidating when they tread on the rights of others.

The lower courts, particularly Referee Haeg, made no qualms about judicially recognizing this tradition.(17a). When Petitioner raised its possible unconstitutionality the Court at the first instance shifted to a discussion of a preference for the father's choice not being illegal as based on illegal sex discrimination because it did not involve the initial, at birth naming of the child. Satisfied with that rationale, the courts "deferred" to the name used longer in ruling on a statutory name change petition objected to by the father soas to assure that the present "non patronymic" system would continue with respect to the children before them. In affirming the lower courts, the Minnesota Supreme Court said:

> "We are not persuaded by Ms. Saxton's numerous constitutional arguments. Her contentions all rest on the assumption that the paternal surname is given preference over the maternal surname in the initial naming of the child and in attempts to change the child's surname. A review of the applicable cases demonstrates that this assumption is ill founded.
>
> We have recognized that neither parent has a superior right to determine the initial surname of their child. No preference is accorded to either the paternal or maternal surname...Due

> deference is given, however, to the fact the child has borne a given surname for an extended period of time." (9a, 10a).

Irrespective of the misplaced reliance on the Laks v. Laks, supra, case to reach for the proposition that at birth neither party--irrespective of whether the parties are living together or not[15]--has a superior right to name marital children, the logic of the courts below is Alice in Wonderland like thinking. The deference given to the name longer used by the Supreme Court virtually precludes the changing of names of children initially given their fathers names as virtually all children of parents of the 60's and most of the 70's have been given. Taking the totality of the court proceedings below from the first hearing to the ruling of the state's highest court, the "deference" is a thinly disguised term for a preference for the father's surname where the father objects to such name being changed regardless of whether he even lives with the child, or his specific patronymic reason for objecting.This case is not dealing with a facially neutral classification which can be foreseen to have impact on women but is not intentionally

meant to "harm" women. Personnel Administrator v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). It is, to the contrary, a classification which under the stringent requirements of the Feeney decision, meets the but/for test of discriminatory intent.[16] A deference to the name longer used is nothing short of a euphemism for the paternal name. As discussed, supra, there is no known case of a father trying to change a child's name over the objection of the noncustodian mother whose name the child was given at birth. The likelihood of the "deference" applying to any child in Minnesota born before the Jacobs decision rendered the same day as the instant case, is nil. Coupled with the near criminal burden of proof the court saddled the Petitioner with, the deference will effectively operate to preclude any changes of children's names where the fathers object.

Such a notion that children should be named with their fathers' names and pass the same on to their children, as so expressly stated in the Respondent's affidavit with respect to his son, is

is of the kind of sex discriminatory classifications relating to the supremacy of the husband and the dependent role of the wife in marriage. Kirchberg v. Feenstra, 101 S. Ct. 1195 (1981); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975). The absolute veto power given the husband under the ruling of the Minnesota Supreme Court is nothing less than the veto power this Court invalidated last term in the case of a husband's right to unilaterally mortgage the family home. Kirchberg v. Feenstra, supra.

A classification based on gender, according to the decisions of this Court must bear a fair and substantial relation to important governmental interests. Articulated in Craig v. Boren, 429 U.S. 190(1976) they have been followed in all gendered based decisions of this Court since then. See Wengler v. Druggists Mutual Ins. Co., 100 S. Ct. 1540 (1980); Caban v. Mohammed, 441 U.S. 380 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977).

The only important governmental objective in a case involving the naming of

minor children is their well being, their best interests. The statutes of Minnesota articulate this interest, Minn. Stat.§§ 259. 10 and 259.11 (1980). The petition in this case was brought with an allegation that the name addition was indeed in the children's best interests. The respondent failed to prove and the courts below did not seek the proof, that a deference to the present name used bore any, let alone a fair and substantial, relation to the valid state interest of furthering the children's best interest. If a deference is to be made, it virtually precludes recourse to the statute, making it a nullity. A name change statute by its terms accepts the concept of changing a name. A deference to not changing a name pursuant to the statute is a judicially imposed impediment, based on a gender based classification, to a custodial parent's utilizing the statute.

The classification created below is an impermissible gender based discrimination under the rulings of this Court which should be declared invalid as contrary to precedent.

By denying the constitutional claims of Petitioner below, the Minnesota Supreme Court failed to decide the substantial question of federal law concerning impermissible gender discrimination. It is a substantial question of federal law which should be ruled on decisively by this Court.

15

The Laks case did not discuss the issue of at birth naming except in dicta and did not specify if it was speaking of married couples living together,or divorced. In the only case decided as between disagreeing parents of a newborn, the court, in Webber v. Parker, 167 So. 2d 519, writ refused, 264 La. 886, 168 So. 2d 269 (1964) denied the noncustodial father the right to veto the name given the newborn in his mother's custody.See Pa. Stat. Ann., Tit. 28, Sec. 1.7 (1975) (if disagreement at birth, naming is custodial parent's right).

16

See Notes, "Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney," 79 Col. L. Rev. 1376 (1979).

III.

Certiorari should be granted because the imposition of the father's choice of name on children in their mother's custody and household, irrespective of the children's actual best interests, conflicts with this Court's declarations of the freedom of personal choice in family matters as a liberty protected by the Due Process Clause of the Fourteenth Amendment; By the imposition of a virtually irrebuttable presumption that children's best interests are served by their using only their father's names despite the facts of a given case, the Minnesota Supreme Court violated the children's constitutional rights of Due Process; By the imposition of an impossible burden of proof for a minor's name change the Minnesota Supreme Court violated the mother's constitutional rights of Due Process

The decision of the Minnesota Supreme Court, imposing the father's name and/or choice of name on children pursuant to a statutory name change procedure, interfers with the liberty of the custodial mother to rear her household, without serving any compelling or otherwise important governmental objective.

The record in this case is replete with the concept of the Petitioner that she is the head of her household and that she has, as custodial parent, made decisions about her children's upbringing, including in this instance, their names. This Court has several times articulated the right of freedom from interference in

the conduct of one's private affairs and family life. Zablocki v. Redhail, 434 U.S. 374 (1978);Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Carey v. Population Services International, 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972) Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923); Roe v. Wade, 410 U.S. 113 (1973);Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510(1925).

Recently a federal appeals court applied this principle to the constitutional right of a woman to breast feed her child during working hours. Dike v. School Board of Orange County, 650 F. 2d 783 (5th Cir. 1981).

Several district courts have applied the right to naming one's offspring, a liberty right. Jech v. Burch, supra; Jones v. McDowell, supra; O'Brien v. Tilson, supra, This case gives this Court the opportunity to articulate this interest in the context of naming by the custodial parent. According to one of the first commentators on name law, the origin of the naming preference for the father came

from the status of the male as the head of the household. Carlsson, "Surnames of Married Women and Legitimate Children," 17 N.Y.L.F. 552 (1971). That old doctrine can be applied equally to a single household family as to a jointly run household. As with all other incidents of custody, the custial parent, as head of the household, should have his/her liberty right to make decisions associated with the responsibilities articulated.

In establishing a virtually irrefuttable standard for a statutory name change in Minnesota, women and children are denied any real due process in the petitioning procedure. This court has disfavored irrebuttable presumptions. Cleveland Board of Education v. La Fleur, supra. So have lower federal courts. Yellow Springs v. Ohio High School Athletic Association, 443 F. Supp. 753 (S.D. Ohio 1978). Requiring proof of one party to a controversy that the other is not bound to puts an undue burden on the process which this Court should clearly articulate in the context of naming. See Devine v. Devine, supra. Turner v. Dept. of Employment Security, 423 U.S. 44 (1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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November, 1981

Appendix

No. 362 Hennepin County Otis, J.
Dissenting,
Wahl, J.
Amdahl, J.

In the Matter of the Application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis.
Case No. 50811

Endorsed
Filed August 21, 1981
John McCarthy, Clerk
Minnesota Supreme Court

S Y L L A B U S

1. The trial court properly relied on Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 138 (1974) in denying the petition to change the minors' surnames from their given name to a hyphenated name consisting of their mother's birth surname and their father's surname.

2. The evidence supported trial court's conclusion that the children's best interests favored retention of their given surname.

3. The trial court committed harmless error by refusing to take testimony from the two minor children.

4. Denial of the petition did not violate constitutional rights of either the children or their mother.

Affirmed.

Heard, considered, and decided by the court en banc.

O P I N I O N

OTIS, Justice.

This is an appeal from an order of the district court, Fourth Judicial District, denying Audrey Saxton's petition on behalf of her minor children to change their given surnames to a hyphenated surname consisting of their mother's maiden name and their father's surname. Four issues are presented: first, whether the trial court's reliance on our opinion in Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974) to resolve the propriety of the requested name change was proper; second, whether the evidence was sufficient to support the trial court's findings that the children's best interests favored retention of their given surname; third, whether the trial court erred in refusing to take the children's testimony and if so, was it reversible error; finally, whether the trial court, by denying the requested change violated constitutional rights of either the children or their

mother. We affirm.

The petitioner changed her surname from "Dennis," her former husband's surname, to "Saxton," her maiden name, in December of 1976. A year ealier, Audrey Saxton and Frederick Dennis were divorced in West Virginia. Having permanent custody of their two minor children, Robert Lynwood Dennis and Jessica Campbell Dennis, Saxton and the children moved to Minneapolis shortly after the divorce.

In April of 1979, Saxton petitioned on behalf of Robert, then nine-years-old, and Jessica, then seven-years-old, to change their surnames from "Dennis" to "Saxton-Dennis." Dennis opposed the petition. At the hearing on June 8, 1979, Saxton appeared on behalf of herself and the children. Dennis, although not present, was represented by counsel.

Saxton and two expert witnesses, John Baudhuin[1] and Dr. Seymour Gross,[2] testifed in favor of the name change.

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Mr. Baudhuin is an assistant to the rector of St. John's Episcopal Church, Minneapolis, and is a family and drug counselor at Parkview Treatment Center, St. Louis Park. He is acquainted with Saxton and her two children through church-related activities and gatherings between their two families.

In Saxton's words, the proposed surname was desirable for the children because it would "reflect their dual parentage and reflect the family unit, the Saxton family unit that we have established here in Minnesota after four years." Both Mr. Baudhuin and Dr. Gross agreed that the name change would be beneficial for the children as it would enhance their self-esteem. However, each found the children to be happy and socially well-adjusted, suffering no ill effects from bearing only their father's surname.

Although Jessica and Robert did not testify, their views of the proposed surname can be gleaned from the record. Dr. Gross testified that the impetus for changing their surnames came from Robert's observation of and questions about the two surnames, "Saxton" and "Dennis" on the family's mailbox. Family discussions, lasting over a period of two years followed, resulting in the filing of the application

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Dr. Gross is the Director and Chief Psychologist for the Pilot City Mental Health Center, Minneapolis. He interviewed the children and Saxton, together and separately, concerning the proposed name change.

to change their surnames to "Saxton-Dennis." Both children related to Dr. Gross that they earnestly desired the name change and were "excited" about the possibility of bearing a surname which combined both of their parents' surnames.

Dennis strives to maintain a close relationshup with his children, despite the distance between their respective homes. Letters and phone calls are frequently and regularly exchanged; birthdays and holidays are remembered with gifts. In the summertime, Jessica and Robert visit their father for a month or longer.

Based on the foregoing evidence, the trial court denied the petition. This appeal followed.

We have previously considered the proper interpretation of Minn. Stat. § 259.11 (1980)[3] in resolving the issue of "whether a change in a child's name should be ordered over the objection of a natural parent***." Robinson v. Hansel, 302 Minn. 34, 35, 223 N.W.2d 138, 140 (1974). In

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Minn. Stat. § 259.11 (1980) provides in pertinent part: "Upon meeting the requirements of section 259.10, the court shall grant the application unless it finds that there is an intent to defraud or mislead or in the case of the change of a minor child's name, the court finds that such

Robinson we noted that the best interests of the child controlled the resolution of the issue and held "judicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change." Id. at 36, 223 N.W. 2d at 140. We are not persuaded by Ms. Saxton's arguments that we improperly interpreted Minn. Stat. § 259.11 (1980) in resolving the issue presented. We decline to alter the guidelines set in Robinson. The trial court's reliance on our opinion in Robinson was, therefore, proper.

This case does present an opportunity to elucidate our decision in Robinson. We first note that neither parent has a superior right to determine the initial surname their child shall bear. In re Marriage of Jacobs, No. 50150 (Minn. Sup. Ct., 1981); cf. Minn. Stat. § 518.17, subds. 2, 3 (1980) (sex of parent not a factor in determining custody or support obligations). However, once a surname has been selected

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3 (continued)

name change is not in the best interests of the child."

for the child, be it the maternal, paternal, or some combination of the child's parents' surnames, a change in the child's surname should be granted only when the change promotes the child's best interests. In determining the child's best interests, the trial court may consider, but its consideration is not limited to, the following factors: the child's preference; cf. Minn. Stat. § 518.17, subd. 1 (1980) (in custody determinations, court may consider child's preference); the effect of the change of the child's surname on the preservation and the development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and the proposed surname; and the difficulties, harassment or embarrassment, that the child may experience from bearing the present or the proposed surname. See also In re Marriage of Schiffman, 28 Cal. 3d 640, 620 P. 2d 579, 169 Cal. Reptr. 918 (1980); In re Change of Name of Harris, ___W. Va.___,___, 236 S.E. 2d 426, 430 (1977) (Harshbarger, J., concurring); Note, The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interests, 1979 Utah L. Rev. 303. In weighing these factors to reach a decision,

the trial court should set out its reasons for granting or denying the application to change the minor's surname. Because the child's welfare is paramount to the question of whether changing his or her name is proper, we encourage the trial court to consider the appointment of a guardian ad litem, and when it would be appropriate and helpful, to appoint a guardian ad litem at the expense of the parties. See Minn. Stat. § 518. 165 (1980).

Saxton's second contention is that the evidence was insufficient to support the trial court's determination. Careful review of the record convinces us that the trial court did not abuse its discretion by concluding the children's best interests were served by keeping their given surname. The evidence, however, would also have supported a contrary finding.

The trial court refused to take testimony from the children, Robert, then nine-years-old, and Jessica, then seven-years-old. Its refusal was apparently based upon its conclusion that the children were neither sufficiently mature nor sufficiently independent of Saxton to make a "discreet decision" regarding their surname. Saxton assigns this ruling as error.

We agree with Saxton's contention that the trial court erred in refusing to take

testimony from Robert and Jessica. In Robinson we stated: "There is no issue, however, that the welfare of the children must ultimately be the controlling consideration in any change of status." Robinson v. Hansel, 302 Minn. 34, 35, 223 N.W. 2d 139, 140 (1974). Thus, the children's preferences are relevant to the determination. Hall v. Hall, 30 Md. App. 214, 351 A. 2d 917 (1976); cf. Minn. Stat. § 518. 17, subd. 1 (1980) (child's preference as to custody may be considered); State v. Waslie, 274 Minn. 564, 143 N.W. 2d 634 (1966) (child's preference in custody determination given consideraable weight). From Dr. Gross' testimony, it is evident that Robert and Jessica were capable of articulating their preferences. The exclusion of their testimony was, therefore, error. However, the error is harnless since it does not appear that their testimony "might reasonably have changed the result if it had been admitted." Poppenhagen v. Sornsin Construction Co., 300 Minn. 73, 80, 220 N.W. 2d 281, 285 (1974).

We are not persuaded by Ms. Saxton's numerous constitutional arguments. Her contentions all rest on the assumption that the paternal surname is given preference over the maternal surname in the initial naming of the child and in attempts to

change the child's surname. A review of the applicable cases demonstrates that this assumption is ill-founded.

We have recognized that neither parent has a superior right to determine the initial surname of their child. No preference is accorded to either the paternal or maternal surname. In re Marriage of Jacobs, No. 50150 (Minn. Sup. Ct. August 21, 1981). When one parent seeks to change the surname of a child, the other parent has standing to object and the resolution of the dispute hinges on the best interests of the child. Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974); Minn. Stat. § 259. 11 (1980). Due deference is given, however, to the fact the child has borne a given surname for an extended period of time.

Finally, we note, as we stated in Robinson, "the time may well come when the child may cause an appropriate change of surname as his or her voluntary act." Robinson v. Hansel, 302 Minn. 34, 38, 223 N.W. 2d 138, 141 (1974).

Affirmed.

WAHL, Justice (dissenting).

I must respectfully dissent. The application of the standard set out by this court in Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974), for granting a change of a minor's surname to that of a stepfather over the objection of the natural father is inappropriate where the change sought is to use the surnames of both natural parents to form the child's surname.

Minn. Stat. § 259. 11 (1980) specifies that a change of name for a minor will be granted unless the court finds that the change is not in the best interests of the child. In interpreting that statute in light of the Robinson facts, where the name change proposed would have eliminated the use of the children's given surname, which was the surname of their natural father, we held that "judicial discretion in ordering a change of the minor's surname * * * should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change." Id at 36, 223 N.W. 2d at 140.

The policy considerations which led to the formulation of a standard requiring such a high burden of proof were (1) that the change in name might weaken the bond

between the child and the non-custodial parent whose name the child bore, (2) that the parent's natural and appropriate desire was to have his children bear his name, and (3) that it was desirable for a child to know his parentage. Id. The same considerations do not support such a standard, however, when a parent seeks to change the child's surname so that no natural parent's name would be eliminated but both names would form the child's surname. The mother's interest in having her children bear and perpetuate her surname should be recognized as coextensive with the father's interest, as are other parental rights and responsibilities, such as custody and support. See Minn. Stat. § 518. 17 (1980). Nor is there reason to believe, on the record before us, that the love and affection Frederick Dennis has for his children or the concern and support he gives them would be diminished in any way if they bore his name along with that of their mother as they wish to do.

The Robinson standard imposes an undue burden on the petitioner when the proposed name change would not eliminate the use of a natural parent's name but would add the name of the other natural parent. In this situation, instead of being required to show that the name change is necessary for

the substantial welfare of the child, the petitioner should be required to show only that the name change promotes the child's best interests. Thus, a change of the minor's surname would be appropriate where the change is beneficial for the child, even though the given name is not detrimental to the child's well-being.

I would reverse and remand for a determination of the best interests of Robert and Jessica in regard to the proposed name change. The testimony of the children should be received.

AMDAHL, Justice (dissenting).

I join in the dissent of Justice Wahl.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

In the Matter of the Application of:

Audrey Davis Saxton, mother of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis.

ORDER

File No.755 270

The above matter came on for hearing before the undersigned, at Special Term, on September 10, 1979, by motion of the applicant to review the Findings and Order of Referee Thomas Haeg confirmed by this court on July 16, 1979.

Terrance J. Selb, Esq. appeared on behalf of applicant in support of the motion, and H. Louise Olson, appeared in [sic] behalf of Frederick [sic] Dennis, the children's father, in opposition thereto.

The Court, having reviewed the Order and the Memorandum attached thereto, and

having heard the arguments of counsel,

FINDS that the Order and Memorandum of Referee Thomas Haeg, confirmed by this court on July 16, 1979 are in all respects based on the law and the evidence.

IT IS ORDERED that the Order of Referee Haeg confirmed by this court on July 16, 1979 is hereby affirmed.

Let the attached memorandum be made a part of this Order.

BY THE COURT:

Dated:
September 28, 1979

/s/ Susanne C. Sedgwick
Judge of District Court

MEMORANDUM

The mother of two minor children, ages eight and nine, seeks to change their surname from their father's name to a hyphenated combination of the mother's maiden name and the father's name.

These children have used their father's surname since birth. At the time they were born the mother apparently approved of the surname and has acquiesced in its use by the children for eight and nine years respectively. Following her divorce from the children's father in 1975 the mother

assumed her maiden name.

This court agrees with Referee Thomas Haeg, that it is not a question of imposing patriarchal custom and tradition on the children, because the court is not being asked to determine the child's initial name. Both parents did that. The court is being asked to create a name for these children which is different from either their mother's or father's surname, and the petitioner has failed to meet her burden of proof that the children's best interests will be served by such a name. Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277 (1975).

S.C.S.
9/28/79

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

In the Matter of the Application of:

Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis.

D.C. FILE No. 755270
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled matter came on for hearing before the undersigned Referee Thomas F. Haeg, by Order of this Court dated April 24, 1979, for change of name of the above-named minor children on behalf of their parent and natural guardian, Audrey Davis Saxton.

Audrey Davis Saxton, appeared as next of friend for Robert Lynwood Dennis and Jessica Campbell Dennis; H. Louise Olson, Esq. appeared for and on behalf of Fredrick

H. Dennis, natural father and objector herein.

Now, therefore, based upon the affidavits, oral testimony of the parties, arguments to the Court, Memoranda of law submitted on behalf of the parties, the Court hereby makes the following:

FINDINGS OF FACT

1. That said Applicants Robert Lynwood Dennis and Jessica Campbell Dennis resided for more than one year immediately prior to the date of their application in the County of Hennepin, State of Minnesota.

2. That Robert Lynwood Dennis in[sic] nine years of age, born October 30, 1969, and Jessica Campbell Davis [sic], is seven years of age, born September 21, 1971.

3. That Audrey Davis Saxton and Fredrick H. Dennis, the natural father of said minor children, were divorced in November, 1975, in West Virginia. That pursuant to the Judgment and Decree therein, petitioner was awarded the permanent custody of said minor children, allowing reasonable visitation with the natural father.

4. That on or about December 19, 1976, the petitioner herein returned to her maiden name, Saxton.

5. That said minor children have no interest in any land or real estae[sic] situated within the State of Minnesota.

6. That the applicants have never made an application to any other Court of competent jurisdiction for a change of name.

7. That the minor children's birth certificates indicate that their last name is Dennis and they have always represented themselves out to the community under the name of Dennis.

8. That the minor children's substantial welfare will be furthered by retaining their current surname.

CONCLUSIONS OF LAW

As Conclusions from the foregoing facts, it is hereby Ordered and Adjudged as follows:

1. That the said application is hereby denied, without prejudice to re-apply to this Court for change of name upon each child attaining the age of fourteen (14) years.

2. That the Clerk of this Court file this Order and record it in the Judgment Book.

Let the attached Memorandum be made a part hereof by reference.

BY THE COURT:

/s/ Crane Winters
Judge of District Court

Dated this 16th day of July, 1979

MEMORANDUM

This is an application for change of name by the natural mother and guardian, as next of friend, of Robert Lynwood Dennis and Jessica Campbell Dennis, pursuant to Minn. Stat. 259.10 (Amended by Laws 1975, c. 52, Sec. 1). The change, if granted, would substitute the children's surnames to a hyphenated name consisting of their father's surname and their mother's maiden name. Petitioner alleges that the purpose of the change is to have "unity" in the family.

Minn. Stat. 259.10 provides in pertinent part that:

> A person who shall have resided in any county for one year may apply to the district court thereof to have his name, the name of his minor children, if any, and the name of his spouse, if the spouse joins in the application, changed in the manner herein specified....If he be a minor, the application shall be made by his guardian or next of kin...however, that no minor child's name may be

> changed without both of his parents having notice of the pending of the application for change of name, whenever practicable, as determined by the court.

Our Supreme Court in Robinson v. Hansel, 302 Minn. 342, 223 N.W. 2d 138 (1974), has interpreted the aforementioned statute by holding, in part, that the father has an interest, or "inherent concern", in having his child bear his surname. The Court came to this conclusion by giving deference to the custom of patronymic identification. Moreover, it compounded this deference to a recognition of the children's substantial welfare, while cautioning the district courts to exercise their discretion to change a minors'[sic] names and only when the evidence is clear and compelling.

To this extent, the petitioner has failed to meet her burden of proving by clear and convincing evidence that the children's best interest require their surname now be changed from that of the father's surname to a hyphenated combination of the father's surname and mother's maiden name.

Firstly, the Court finds little merit in the petitioner's statement that the children have joined in the application. Their ages are nine (9) and seven (7). They have been in the exclusive custody of their mother since the divorce. They are not, at this time, of such sufficient age and

maturity to make a discreet decision in this respect. In fact, petitioner's own expert witness stated that the children may be very vulnerable and influenced by their custodial parent.

Secondly, there is nothing on the record to evince whether the proposed change would further the minors' substantial welfare. There were no facts proffered to indicate that their social esteem or status would in any manner be compromised or disconcerted by retaining their father's surname. There has been no convincing evidence that they have experienced any disquietude because of their current surname. They are not inconvenienced. Moreover, a legion of cases hold that where a father's surname would bring needless ridicule or embarrassment to the children, then a change of name should be seriously considered. See 53 A.L.R. 914. However, such is not the case at bar.

Respondent is an Episcopal minister. The children are brought up in the Episcopal faith by their mother. He has been a good father. He has not abandoned the children. The family residence prior to the divorce was on the East Coast, where respondent continues to reside. Petitioner removed the children from North Carolina subsequent to the divorce. In any event,

the father is current in all of his ordered child support payments. He regularly sends his children gifts. He exercises his visitation rights with the children. He has evinced a record of parental affection and guidance for his children.

Therefore, the children's welfare is bettered not by now changing their names, but by retaining respondent's vestiges to his children in his name. And, since the primary object herein is their welfare, a name change that would unnecessarily compromise the estrangement of father and child should be glanced upon with a jaundiced eye. The Robinson v. Hansel case, supra, opined that:

> Society has a strong interest in the preservation of the parental relationship. Even though a divorce decree may terminate a marriage, courts have traditionally tried to maintain and to encourage continuing parental relationships. The link between a father and child in circumstances such as these is uncertain at best, and a change of name could further weaken, if not sever, such a bond. 223 N.W. 2d at 140 (Underlined supplied).

And, in Laks v. Laks, 25 Ariz. App. 58, 540 P. 2d 1277 (1975), it was said that:

> These cases recognize that when there is a divorce and the mother is given custody of the children, the bond between the father and his children in such circumstances is tenuous at best and if their name is changed, that bond may be weakened, if not destroyed. 540 P. 2d at 1280

Petitioner further contends that notwithstanding custom it is important that her children carry on her family name, and, that failure to so find constitutes a classification based on sex, which may be contrary to the Fourteen [sic] Amendment to the Constitution. This contention, therefore, puts the matter on all-fours with the Laks case, supra, wherein the Solomonic wisdom of the Arizona courts, interpreting a statute similar to ours, deciding whether a similar, hyphenated name would be proper, and citing Robinson v. Hansel, supra, held that:

> However, it must be remembered that what we are concerned with in this is not the initial naming of a child but a change of name. Ther persons who have the paramount interest are the children and their best interests are controlling. 540 P. 2d at 1280.

In other words, the Court is not so much imposing patriarchal custom and tradition upon the children, but, rather, securing and maintaining the parent's understanding and agreement when they first named their children at birth. See Re Epstein, 121

Misc. 2d 840, 157 N.Y.S. 2d 333.

T.F.H.

Notice of oral argument from the Supreme Court of Minnesota

NOTICE OF ORAL ARGUMENT

To: Counsel of Record

You will be heard on November 18, 1980 at 9:00 a.m. before the Court in the matter of:

Frederick H. Dennis,

respondent,

vs.

In the matter of the application of Audrey Davis Saxton, etc.,

appellant

STATE OF MINNESOTA

IN SUPREME COURT

In the matter of the application of Audrey Davis Saxton, etc.

vs.

Frederick H. Dennis

ORDER

Upon application of attorney for respondent, Frederick H. Dennis,

IT IS HEREBY ORDERED.

That the above-entitled appeal be, and the same is, hereby stricken from the November 18, 1980 calendar and will be placed on the December, 1980 calendar.

Dated: October 24, 1980.

BY THE COURT:

/s/

Associate Justice

STATE OF MINNESOTA

IN SUPREME COURT

Frederick H. Dennis,

Respondent,

50811 vs.

In the Matter of the Application of Audrey Davis Saxton, etc.

Appellant.

O R D E R

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that appellant's motion for oral argument be, and the same, is hereby denied.

Dated: 5/1/80

BY THE COURT:

Chief Justice
/s/ Robert J. Sheran

Supreme Court
Filed
May 1, 1980
JOHN McCARTHY, Clerk

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STATE OF MINNESOTA

IN SUPREME COURT

In the matter of the application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Prehearing
Conference Order

The above-entitled matter came on for a prehearing conference before the undersigned on January 18, 1980, Terrance J. Selb appearing for appellant Audrey Davis Saxton and H. Louise Olson appearing for respondent Fredrick H. Dennis.

IT IS ORDERED

(1) That the matter be recommended for consideration by a panel of the court without oral argument;

(2) That appellant shall forthwith order preparation of the transcript;

(3) Appellant shall have 20 days in which

to file photocopy briefs;

(4) That following receipt of appellant's brief, respondent shall be allowed 20 days in which to file photocopy briefs;

(5) That following receipt of respondent's brief appellant shall be allowed 10 days in which to file reply briefs;

(6) That respondent's motion for summary affirmance is deferred for consideration by a panel of this court.

Dated: January 21, 1980

BY THE COURT:

/s/ C. Donald Peterson
C. Donald Peterson
Prehearing Conference Judge

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

* * * * * * * *

In re the change of name of:

Robert Lynwood Dennis and Jessica Campbell Dennis and acting on their behalf as their mother, Audrey Davis Saxton

Petitioners AFFIDAVIT

* * * * * * * *

STATE OF MINNESOTA

ss

COUNTY OF HENNEPIN

Audrey Davis Saxton, being first duly sworn upon oath, deposes and says:

I.

That she is a resident of Hennepin County and is the mother of Robert and Jessica Dennis and that they live with her and that she has legal custody of them.

II.

That she changed her name from Audrey Saxton Dennis to her family name of Audrey Davis Saxton before this Court in December,

1976.

III.

That she petitions this Court on behalf of her children in the above entitled matter and that she makes this Affidavit upon belief that adding her family name to Robert and Jessica's name, so that it will be Saxton-Dennis, is in the children's best interest.

IV.

That she and her children would like now to be united in name as an outward and visible sign of their family unit.

V.

That the children's father, Fredrick Hogart Dennis, lives in Asheville, North Carolina, and refuses to give his approval to the addition of their mother's name of Saxton to Robert and Jessica at this time.

VI.

That it is her wish and the wish of both Robert and Jessica, having thought about and discussed this name addition for over a year, that they may by order of this Court be legally named Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis.

/s/ Audrey Davis Saxton

Subscribed and sworn
before me this ___ day
of April, 1979.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

In the matter of the application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis

AFFIDAVIT of Fredrick H. Dennis Opposing Petition of Audrey Davis Saxton To Change Surname of Said Parties' Children

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Fredrick H. Dennis, being first duly sworn, deposes and states as follows:

1. That I am the natural father of Robert Lynwood Dennis and Jessica Campbell Dennis.

2. That the Petitioner and I were divorced in the Circuit Court of Ohio County, West Virginia, on the 15th day of December, 1975. That under the terms of said divorce Order, the Petitioner, then known as Audrey S. Dennis, was awarded the care, custody and control of our two minor children, subject to my reasonable rights of visitation. That a copy of said Order is attached hereto.

3. That I am presently the associate rector of an Episcopal parish known as All Souls Parish located in Asheville, North Carolina and that I presently reside in Asheville, North Carolina.

4. That my base salary as an associate rector is $10,900.00 and of that amount my former wife and children receive $8,253.96 per year, approximately $6,000.00 of which is child support. Further, that I maintain two insurance policies for the benefit of the Petitioner and my two children, which costs me approximately $550.00 per year. That I buy my children clothes and gifts in addition to providing child support. That I allege these facts only to demonstrate to the Court that I have accepted full financial responsibility for my children and have not failed to support them.

5. That I love my children more than I can adequately express and that my children reciprocate this love. That since my divorce from their mother, I have exercised visitation with my children to the fullest extent possible and permitted, and my personal relationship with them is good and solid. That I call them at least once a month and usually write them a card or letter every week or ten days. That

both children visit me every summer for one month and that I am happy to provide the costs of transportation for these visits.

6. That my son, Robert Lynwood Dennis, is the only male heir of the Dennis surname, as I am an only child and my father is an only child.

7. That I disagree with Par. III of Petitioner's Affidavit which states that the change of the surname of the children from Dennis to Saxton-Dennis is in the children's best interest. That I believe that it was solely their mother's idea to change the surname of the minor children, as they are too young to realize the implications of said name change. That I feel that this name change will confuse the children and will alienate them from me, especially in view of the physical distance presently between us. That it is my belief that it is in the best interest and welfare of my children to continue to maintain the surname Dennis, as it will serve to preserve my parental relationship with them.

8. I respectfully submit to this Court that it would be adverse to the best interests and welfare of my children to grant the relief sought by Petitioner and therefore request that the Court deny said Petition.

Further Affiant sayeth naught, except that this Affidavit is submitted in opposition to the relief sought by the Petitioner.

/s/ Fredrick H. Dennis

Subscribed and sworn to before
me this 28th day of May, 1979.

/s/ Janet S. Guthrie
Notary Public
My commission expires -8-2-83

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STATE OF MINNESOTA

IN SUPREME COURT

In the matter of application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Appellant,

vs.

Fredrick H. Dennis,

Respondent.

MOTION TO RECONSIDER FOR ORAL ARGUMENT

To: H. Louise Olson, Attorney for Respondent, 670 Pillsbury Building, Minneapolis, Minnesota 55402.

PLEASE TAKE NOTICE that the undersigned will move this Court for an Order to reconsider its previous decision and allow oral arguments in the above captioned matter. Said motion shall be based upon the attached affidavit and the files and

records contained herein.

/s/ Terrance J. Selb
Attorney for Appellant
230 Americana Bsnk Builfing
5050 France Avenue South
Edina, Minnesota 55410
612-927-9966

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STATE OF MINNESOTA

IN SUPREME COURT

In the matter of application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Appellant,

vs.

Fredrick H. Dennis,

Respondent.

AFFIDAVIT

Audrey Davis Saxton, being duly sworn on oath, executes the following affidavit as to her financial status at the request of Terrance J. Selb and Priscilla Ruth MacDougall, in support of the motion for oral argument before the Court.

1. I live at 4304 Xerxes Avenue South, Minneapolis, Minnesota 55410.

2. I've lived in Minneapolis with my children, Robert and Jessica, since

December 2, 1975.

3. From September 15, 1975, when my husband moved from our home in Wheeling, West Virginia, to Virginia, until December 1, 1975, 3 days after the divorce hearing, my children and I continued to live in the rectory of the parish for which my ex-husband had been rector until his resignation, September 14, 1975. The children and I remained in the rectory after my ex-husband's departure at the invitation of the parish because I had no money to move and did not know where I would be able to financially establish a household with my two children.

4. During my marriage to my ex-husband I only worked outside of the home from December, 1967, through July, 1969, when I stopped for the birth of my first child, Robert, and during the school year of 1974-1975, when I worked part time as my ex-husband's secretary. In both cases I contributed my earnings to the expenses of the household and di not save any money for myself.

5. After my ex-husband moved to Virginia, and later North Carolina, I sold many personal items in order to have money enough for my children and me to live on.

6. Throughout the years, from September, 1975, to the present, I've sold many per-

sonal items as necessary in order to live on. I estimate that I have earned $800.00 from these sales. This has been necessary despite the $162.50 (and since 1979, $190.00) alimony and $500.00 child support per month my ex-husband started paying and has paid regularly since November, 1975.

7. The amount of alimony and child support is based upon my ex-husband's base salary which does not include allowances including housing, utilities and car, which were, at the time of the divorce, equal in value to his base salary and which, to the best of my knowledge, still are. The amount of alimony and child support was not and is not based upon the additional income generated by other employment which my ex-husband has held during our marriage and after our divorce such as part time teaching. Nor has it ever been based upon additional income generated by his present wife whom he married in June, 1977, and whom I know to have been earning money during their marriage.

8. After my divorce hearing in November, 1975, I moved to Minneapolis, the home of my birth and where my grandmother, and sister and her family resided and still reside. My sister housed us until we were financially able to move into a duplex

for six months, from December 15, 1975, until June 1, 1976. We lived again with my sister for the summer at a rent of $100.00 per month until I was financially able to move with my children into our own apartment.

9. From March, 1976, to September, 1979, I have worked as a Special Learning and Behavior Problem tutor/teacher aide, and in clerical positions. I have earned during this time approximately $7,170.00.

10. At the present and since September, 1979, I have been enrolled full time as a candidate for a master's degree in social work at the University of Minnesota. Between June, 1976, and June, 1978, I earned a B.A. at the University of Minnesota on a part time basis.

11. After I complete my Master's degree in Social Work and procure full time employment, I do not intend to accept further alimony from my ex-husband.

12. For the purposes of paying tuition and for living expenses I have borrowed $6,400.00 in student loans since September, 1977. I have borrowed $5,00 from my parents. I am indebted to Northwestern National Bank and Master Charge by $1,000.00.

13. I have paid all legal fees generated by this case since I first applied to District Court in May, 1979, to add my name to my childrens' names, including attorney's fees charged to the amount of $450.00. My attorneys have asked for no other remuneration and have consented to handle the case for just the amount already paid.

14. If my attorneys had not agreed to take this case as stated I could not have afforded to bring the appeal.

Dated this 12th day of May, 1980.

/s/ Audrey Davis Saxton

Subscribed and sworn to before
me this 12th day of May, 1980.

/s/ Terrance J. Selb

STATE OF MINNESOTA

IN SUPREME COURT

Frederick H. Dennis,

Respondent,

vs.

In the matter of application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis,

Appellant.

MOTION IN OPPOSITION TO ORAL ARGUMENT

To: Terrance J. Selb, Suite 230, Americana Bank Building, 5050 France Avenue South, Minneapolis, Minnesota 55410, Attorney for Appellant:

PLEASE TAKE NOTICE that the undersigned will move this Court for an Order affirming its Prehearing Conference Order recommending this matter for consideration by a panel of the Court without oral argument. Said Motion shall be based upon the attached Affidavit and the files and records contained herein.

CARLSEN, GREINER AND LAW

By /s/ H. Louise Olson
Attorney for Respondent
670 Pillsbury Building
Minneapolis, Minnesota 55402
(612) 333-1333

STATE OF MINNESOTA

IN SUPREME COURT

Frederick H. Dennis,

Respondent,

vs.

In the matter of application of Audrey Davis Saxton, mother and natural guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, to change their names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Appellant.

AFFIDAVIT

H. Louise Olson, being first duly sworn upon oath, deposes and says:

1. That she is the attorney for the Respondent in the above entitled matter.

2. That it was the Court's decision to recommend this matter for consideration by a panel of the Court without oral argument based, in part, on the financial status of the parties.

3. That the attorney for the Appellant, as stated in his Affidavit, has prepared an exhaustive and authoritiative brief on the issues on appeal; that your Affiant believes that the Court can fairly and adequately decide this case based on that brief without oral argument.

FURTHER AFFIANT SAYETH NOT.

CARLSEN, GREINER AND LAW

By /s/ H. Louise Olson
Attorney for Respondent
670 Pillsbury Building
Minneapolis, Minnesota 55402

Subscribed and sworn to before me
this day of , 1980.

_____
Notary Public

NATIONAL ORGANIZATION FOR WOMEN

ROCHESTER CHAPTER

May 11, 1980

Robert C. Serhan, Chief Justice
Supreme Court of Minnesota
St. Paul, Minnesota 55155

Re: In the matter of Audrey Davis Saxton, etc. vs. Fredrick H. Dennis, Case Number 50811

Dear Justice Sheran:

The Rochester Chapter of the National Organization for Women has become aware of the above case involving a woman's right to participate in the naming of her children, and her children's right to share their mother's and father's name as a hyphenated surname.

Our chapter has been actively involved in advocating and securing the right of married women to be known by the names of their own choosing. We consider the issue before the Court in Ms. Saxton's case of extreme importance to us personally as well as to all Minnesota women and women in other states who may be affected by the decision of your Court.

Divorce is a common phenomenon in the United States and courts nation-wide have recognized the right of divorced women who use their husbands' surnames during their marriages to change their names back to former names when they have children in their custody who still bear the same names as the father's/ ex-husband's. Cases are being brought to insure the right of women to have equal say in naming their children at this state, consistent with the children's best interest, as well as at birth.

How the Supreme Court of Minnesota will rule in Ms. Saxton's and her children's case will affect how lower courts in this state handle similar statutory name petitions. The case will have state-wide impact just as will the pending case of Peggy Jo Danielson vs. Bradley Jacobs, Case Number 50150.

Oral argument has been granted in the Danielson case. We urge that likewise you grant oral argument in the Saxton case in the interest of doing justice to an issue of great concern to women.

Sincerely,

/s/ Dr. Helen Loeb,Co-President
National Organization for Women
Rochester Chapter

cc: Audrey Davis Saxton
Terrance J. Selb, Attorney at Law
Priscilla Ruth MacDougall, Attorney at Law
Carlsen, Greiner and Law, Attorneys at Law

WOMEN'S NAME RIGHTS

The Spokeswoman

August, 1981, p. 7

by Priscilla Ruth MacDougall

An ever present legal and feminist issue, the right of women to name themselves and their children continues to be regularly debated, litigated and won. Women's right to retain or change their names irrespective of their marital status on the same basis as men in the United States is all but a universally recognized legal right.

As cases are litigated to establish women's rights as custodial parents to name their children, the courts are being forced to reexamine the traditional patronymic naming patterns of the U.S. The custom that children born to married parents naturally bear their fathers' surnames regardless of the parents' and children's interests and preferences can no longer withstand judicial, legislative and federal and state agency scrutiny. The custom that children born to unmarried parents bear their mothers' surnames without question likewise cannot withstand scrutiny as unmarried couples choose to live and rear children together and unmarried single parents expect that naming their children in their custody is a natural right.

Almost ten years ago a married woman in Alabama went into court to get a driver's license in her own surname. Her lawyers coceded that Alabama law required her to change her name at marriage and argued that the requirement was unconstitutional. The federal court said that requiring married women to use their husbands' surnames on drivers' licenses as a matter of state law was not unconstitutional because married women, as any other persons, could get court

ordered name changes via a "simple and inexpensive" procedure. The United States Supreme Court agreed without a hearing.

Alabama law was not litigated ten years ago. Today it is finally being litigated in the state courts. Unless Alabama goes a route different from every other state which has examined the common law on which states' name law is based, when the case there is finished there should be no judicial obstacle in any state for a married woman to simply retain her surname at marriage.

The one state which ever really had a requirement that married women change their own names at marriage, Hawaii, repealed its statutory requirement in 1975 after a state court knocked it down as unconstitutional.

Since the early seventies, state courts and attorneys general nationwide have ruled consistently that women have the same right as men to choose their own surnames in the context of retaining their surnames at marriage, changing their surnames while they are married and changing their surnames when and after they divorce. Governmental requirements that women use prefixes such as "Miss" or "Mrs." have been eliminated by judicial, legislative and executive action at both the state and federal level. Some states have begun to address the right of women and men to use more than one surname for official purposes. Nonjudicial name change has been recognized in most states.

In addition, Hawaii, Minnesota, Oregon, Massachusetts and Iowa have passed statutes which provide for married couples to choose between designated surnames at marriage. The Iowa Attorney General has ruled that the statute there does not abolish the

common law right of persons to change their names nonjudicially after first choosing one of the names.

Just as the common law never required married women to use their husbands' surnames, the common law has never required parents to name their children with any particular surname. Some statutes have abrogated the common law with respect to birth certificate naming, and traditionally the courts have recognized a right of fathers over mothers to name minor children in cases where the parents disagree after divorce. In a landmark decision at the end of 1980, the California Supreme Court overruled all its precedent in this regard as obsolete and inconsistent with women's rights and children's best interests.

Although the California case is a breakthrough, just as with women's naming rights, constant vigilance and effort by the women's movement will be necessary to maintain the gains. Any resistance to adult women retaining and changing their surnames is and has been minor compared to the resistance against women having naming rights over their children. And, unlike the obvious right of individual adults to choose their own names, where minor children are concerned, there are usually two interested parents both of whom have rights over their offspring.

Most cases involving children's names fall into one of these four categories:

(1) Parents (married or unmarried) agree as to child's name at birth and the state tries to impose a birth certificate name on the child because of statute, regulation or policy;

(2) Parents (separated or divorced) disagee

at birth while the mother has custody;

(3) Parents (unmarried) disagree at birth or while the child is still a minor and mother has custody;

(4) Parents disagree at or after divorce and mother has custody of older children initially given the father's surname.

The fourth type of case, arising most frequently and most often lost at the appellate level, is the kind of case in which the courts developed the paternal preference.

If cases are argued traditionally, recognizing the superior right of the father unless he has disgraced his name beyond tolerance--they will lose.

If a court is faced with the obvious solution--a preference for the custodial parent with the burden of challenging that parent's judgment on the non custodial parent--it is usually persuaded, particularly since the California precedent.

Opposition

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NO. 81-959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

AUDREY DAVIS SAXTON, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, For Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton Dennis,

Petitioner,

-v.-

FREDRICK H. DENNIS,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT

FREDRICK H. DENNIS
All Souls Parish
Biltmore Station
Asheville, NC 28805

Appearing Pro Se

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Minnesota should be dismissed. No federal question exists. The decision of the Minnesota Supreme Court is supported by an adequate and independent state ground.

I.

The United States Supreme Court, from the time of its foundation, has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. The Court's only power over state judgments is to correct them to the extent they incorrectly adjudge federal rights. Even then, the Court has stated it will not render an advisory opinion. If the same judgment would be rendered by the state court after the Supreme Court corrected the state court's view of federal law, the Court's review could amount to nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 123-126, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945). In the instant case, despite efforts by petitioner to involve her federal rights as well as those of her children, it is apparent from the decision of the Minnesota Supreme Court that its decision was based upon an adequate and independent state ground. Consequently, the petition should be denied.

In reviewing the lower state court, the Minnesota Supreme Court considered four issues.

1. Did the trial court properly rely on Robinson v. Hansel, a state court opinion, to resolve the propriety of the requested name change?
2. Was the evidence sufficient to support the trial court's findings that the childrens' best interests favored retention of their given surname?
3. Was it error, and if so, reversible error, for the trial court to refuse to take the childrens' testimony?
4. Did the trial court, by denying the requested change, violate the constitutional rights of either the children or their mother?

In addressing the first issue, the Minnesota Court discussed its opinion in Robinson. The Robinson court, in construing state law, held that the best interests

of the child controlled the resolution of the issue of whether a change in a child's name should be ordered over the objection of a natural parent. The Robinson court further held that "judicial discretion in ordering a change of a minor's surname against the objection of one parent should be exercised with great caution and only where the evidence is clear and compelling that the substantial welfare of the child necessitates such change". Robinson v. Hansel, 302 Minn. 34, 36, 223 N.W. 2nd 138, 140 (1974).

The Minnesota Court speaking in the instant case stated that it had properly interpreted state law in resolving the issue in Robinson of whether a change in a child's name should be ordered over the objection of a natural parent. The court declined to alter the guidelines set forth in Robinson and found that the trial court's reliance on Robinson in the instant case was proper. The United States Supreme Court, has, in the past, considered that state courts speak with final authority on questions of state law. Eg. Mullaney v. Wilbur, 421 U.S. 684, 689, 95 S. Ct. 1881, 1885-6, 44 L. Ed. 2d 508 (1975); Scripto, Inc. v. Carson, 362 U. S. 207, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960). The Court should not take this opportunity to reverse its thinking and interfere with the Minnesota Court's finding that, in Minnesota, state law requires that the best interests of the child control resolution of the issue of whether a change in a child's name should be ordered over the objection of a natural parent.

The Minnesota Court in addressing the second and third issues found that the evidence was sufficient to support the trial court's determination that the children's best interests were served by keeping their given surname and that the trial court's error in excluding the children's testimony was harmless. The Minnesota Court's action on these two issues can hardly be said to raise a substantial federal question. Analysis of a state law evidentiary question is peculiarly a matter for state court interpretation.

In considering the fourth issue of whether, in denying the requested change, the trial court violated the constitutional rights of either the children or the mother, the Minnesota Court stated that it was not persuaded by petitioner's numerous constitutional arguments. The Court stated that petitioner's constitutional arguments were based on the ill-founded assumption that the paternal surname is given preference over the maternal surname in the initial naming of the child and

in attempts to change the child's surname. Neither parent in Minnesota has a superior right to determine the initial surname of their child. In re: Marriage of Jacobs, No. 50150 (Minn. Sup. Ct. August 21, 1981). That it is not the issue in the instant case, however. The issue is whether an impermissible preference is given to the paternal surname as a result of state action in attempts to change a child's surname. While it may be true that custom is probably responsible for petitioner's children presently bearing the surname of their father, no preference is given by the State to the paternal surname in initially determining the surname of the child or in attempts to change the name. Resolution of any dispute between parents over the surname of the children hinges on the best interests of the child. See Robinson, supra. No issues of denial of equal protection or due process are involved in the instant case.

II.

It is abundantly clear from reading the opinion of the Minnesota Supreme Court in the instant case that its decision was based upon adequate and independent state grounds. For that reason the Supreme Court should deny the petitioner's writ. Murdock v. Memphis, 20 Wall 590, 22 L. Ed. 429 (1875). It is further apparent from reading the state court's opinion that, were it possible to conclude a federal question was presented, the same judgment would be rendered by the Minnesota Court after the Supreme Court corrected its view of federal law. The Minnesota Court emphasized that the basis for determining whether a change in a child's name should be ordered over the objection of a natural parent is governed by the adequate and independent state ground of what would be in the best interest of the child. The Court should not review a case, even if it contains a federal question, if there is an adequate state ground that supports the state court decision. Murdock v. Memphis, supra.

CONCLUSION

The decision of the Minnesota Supreme Court is based upon an adequate and independent state ground. No federal question regarding the constitutional rights of petitioner or the minor children to equal protection and due process is involved. The Petition for writ of certiorari should be dismissed.

Frederick Dennis
Appearing Pro Se

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

CERTIFICATE OF SERVICE

The undersigned attorney licensed to practice law in the State of North Carolina hereby certifies that the following attorneys for the petitioner were served by mail at their respective addresses shown below in accordance with the requirements of Rule 28 of the Rules of the Supreme Court of the United States:

Priscilla Ruth MacDougall
346 Kent Lane
Madison, Wisconsin 53713
608-255-2971; 274-6729

Terrance J. Selb
1600 Dain Tower
527 Marquette Avenue
Minneapolis, Minnesota 55402
612-339-3100

This 16th day of February, 1982.

Thomas R. West

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

AUDREY DAVIS SAXTON, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, For Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton Dennis,

Petitioner,

-v.-

FREDRICK H. DENNIS,

No. 81-959

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Fredrick H. Dennis, asks leave to file the attached response to petition for writ of certiorari without filing forty (40) printed copies and to proceed in forma pauperis. Respondent was represented pro bono in the Supreme Court of the State of Minnesota and is presently being assisted by counsel pro bono.

Fredrick H. Dennis

AFFIDAVIT

I, Fredrick H. Dennis, being first duly sworn according to law, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed in forma pauperis, I state that because of my financial burdens and court ordered responsibilities, I am unable to bear the expenses of said case in that nineteen (19%) percent of my gross monthly salary is paid to my former wife, petitioner, as

alimony, and fifty seven (57%) percent of my gross monthly salary goes to my children as court ordered child support, so that I am left with twenty-four (24%) percent of my gross monthly salary to pay taxes and support my wife and, during the summer months, her son.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. I am employed as the associate rector at All Souls Episcopal Church, Biltmore Station, Asheville, North Carolina 28803.

Gross Salary	Net Salary After Taxes
$972.00	$738.00

Net Salary after payment of taxes and Court ordered obligations

- $ .72

Transportation

$150.00 (This amount reimburses me for transportation expenses incurred in my profession. A typical large expense is visitation of parishioners, particularly those that are ill.)

2. I receive Five Hundred Seventy-three and 58/100 ($573.58) Dollars per month as a housing allowance.

3. I and my wife have joint checking and savings accounts in a total amount of ~~One Thousand Sixty-Four and 87/100 ($1,064.87) Dollars~~. A NEGATIVE BALANCE OF 189.00.

4. I own a 78 Ford / 72 Dodge (car) valued at $2875 / 695.00 which ~~A~~ is used in my profession daily for the purpose of visiting my parishioners.

5. Robert Lynwood Dennis, son
Jessica Campbell Dennis, daughter
Dorothy C. Dennis, wife
Philip W. Garland, wife's son who lives with us four months out of every year.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Fredrick H. Dennis

Fredrick H. Dennis

Subscribed and sworn to before me this 12th day of FEBRUARY, 1982.

Carole D. Vance now Carole D. McMichael

Notary Public

CAROLE D. VANCE, Notary Public
My commission expires May 2, 1982

My Commission Expires:

_____

AFFIDAVIT

I, THOMAS R. WEST, being first duly sworn according to law, depose and say that I am an attorney licensed to practice law in the State of North Carolina, that I am familiar with the financial background of Mr. Fredrick H. Dennis, that Mr. Dennis feels the costs of responding to the petition for writ of certiorari would render him unable to meet his obligation to support his children and wife, that in my opinion Mr. Dennis's perception of his inability to bear the costs of responding in this action and meeting his obligation to support his family is well founded and accurate. I have assisted Mr. Dennis in his preparation of a response to the petition for certiorari. I have received no remuneration for my services and do not expect to due to my judgment that Mr. Dennis cannot afford to pay for legal services.

Thomas R. West

THOMAS R. WEST
P. O. Box 7146
Asheville, NC 28807
(704) 258-3986

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

I, a Notary Public of the County and State aforesaid, certify that THOMAS R. WEST, personally appeared before me this day and acknowledged the execution of the foregoing instrument.

WITNESS my hand and official seal this 2nd day of February, 1982.

My Commission Expires:
8-2-83

Janet L Grathus
Notary Public

AFFIDAVIT

I, H. LOUISE OLSON, being first duly sworn according to law, depose and say that I am an attorney licensed to practice law in the State of Minnesota, that I am familiar with the financial background of Mr. Fredrick H. Dennis, that Mr. Dennis feels the costs of responding to the petition for writ of certiorari would render him unable to meet his obligation to support his children and wife, that in my opinion Mr. Dennis's perception of his inability to bear the costs of responding in this action and meeting his obligation to support his family is well founded and accurate. I represented Mr. Dennis in the case at issue in the Courts of the State of Minnesota. I received no remuneration for my services relating to the appeal of this matter to the Minnesota Supreme Court and represented Mr. Dennis for costs only.

H. Louise Olson

H. LOUISE OLSON
Lakeland Professional Building
Annandale, MN 55302
(612) 274-3044

STATE OF MINNESOTA
COUNTY OF Wright

I, a Notary Public of the County and State aforesaid, certify that H. LOUISE OLSON, personally appeared before me this day and acknowledged the execution of the foregoing instrument.

WITNESS my hand and official seal this 11th day of February, 1982.

My Commission Expires:

_____

Bette L. Nelson
Notary Public

BETTE L. NELSON
NOTARY PUBLIC - MINNESOTA
WRIGHT COUNTY
My Commission Expires Oct. 8, 1988

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 8 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-959

AUDREY DAVIS SAXTON, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, minors, For Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Petitioner,

— v. —

FREDRICK H. DENNIS,

Respondent.

REPLY OF PETITIONER TO RESPONSE OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PRISCILLA RUTH MACDOUGALL
346 Kent Lane
Madison, Wisconsin 53713
608-255-2971; 274-6729

Attorney for Petitioner

QUESTION PRESENTED

Is this case appropriate for review by the United States Supreme Court?

TABLE OF CONTENTS

Question Presented..... i

Table of Contents..... ii

Table of Authorities..... iv

Statement and Summary of Argument..... 2

Argument..... 5

I. This case involves substantial federal questions about which state and federal courts in every state need guidance as courts nationwide grope with the issues involved in naming children and flounder and conflict in their decisions with respect thereto..... 5

A. Where there is a determination that children's best interests will be equally served by the mother's (and children's) choice of name or the father's (choice of) name, a deference to the father's name denies the mother, a woman, equal protection of the laws in direct contradiction to the precedents of this Court..... 7

B. The imposition of an impossible and insurmountable burden of proof to overcome the preference for the father's (choice of) name violates a woman's right to equal protection and due process of the laws in direct contradiction to several rulings of this Court invalidating unequal gender based burdens..... 8

C. Deference to the father's (choice of) name does not substantially relate to the important govern-

mental interest of guaranteeing that children's best interests are served, and is therefore in direct violation of the equal protection principle as articulated in numerous decisions of this Court..... 9

II. The case of Audrey Davis Saxton on behalf of the two children in her custody, Robert and Jessica, is the appropriate case for the United States Supreme Court to review the important federal questions involved..... 11

Conclusion..... 16

TABLE OF AUTHORITIES

CASES PAGE

Allen v. Lovejoy, 533 F. 2d 522 (6th Cir. 1977)..... 3

Allen v. Shelby County, No. C-75-118 (W.D.Tenn. 1978)..... 3

Petition of Christjohn, 428 A. 2d 598 (Pa. Super. 1981)..... 5,9

In re Marriage of Dorks, 98 Ill. App. 3d 1046, 425 N.E. 2d 29 (1981).. 14

Forbush v. Wallace, 341 F. Supp. 217 (M.D.Ala. 1971), aff'd. per curiam, 405 U.S. 970 (1972)..... 2,12

Frontiero v. Richardson, 411 US. 688 (1973)..... 8,15

In re Harris, 236 S.E. 2d 426 (W.Va. 1977)..... 13

Hurta v. Hurta, 25 Wash. App. 95, 605 P. 2d 1278 (1979)..... 13

Jacobs v. Jacobs, 309 N.W. 2d 303 (Minn. 1981)..... 13

Kinder v. Schwarzkopf, No. 703509 (Dist. Ct., Hennepin County, Minn., Order For Dismissal, Oct. 21, 1974)..... 12

Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W. 2d 458, 67 A.L.R. 3d 1249 (1975).....3,14

In re M.L.P., 621 P. 430 (Tex. Civ. App. 1981).....3,13

May v. May, 626 P. 2d 801 (Kan. App. 1981)..... 14

In re Mullinex, 152 Ga. App. 215, 262 S.E. 2d 540 (1979)..... 13

Orr v. Orr, 440 U.S. 268 (1979)..... 14

Reed v. Reed, 411 U.S. 71 (1971)..... 7

Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974)..... 6

Saxton v. Dennis, 309 N.W. 2d 298 (Minn. 1981)..... 5,passim

In re Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 918, 620 P. 2d 579 (1980)..... 6

Stanton v. Stanton, 421 U.S. 7 (1975)... 3

Stuart v. Board of Supervisors, 266 Md. 440, 295 A. 2d 223 (1972).....3,12

Stull v. Nash, ___S.C.___, 280 S.E. 2d 209 (1981)..... 6

In re Marriage of Thomas, ___Ill. App. 3d___, 427 N.E. 2d 1009 (1981)..... 14

Application of Tubbs, 620 P. 2d 384 (Okl. 1980)..... 6

Weinberger v. Weisenfeld, 420 U.S. 636 (1975)..... 8

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980)..... 8,9

Whitlow v. Hodges, 539 F. 2d 582 (6th Cir.1976), cert. denied, 429 U.S. 1029 (1976)..... 12

STATE STATUTE AND ADMINISTRATIVE DIRECTIVE

Minn. Stat. sec. 517. 08 (1980)..... 12

Memorandum, Kentucky Department of Transportation, Oct. 30, 1981..... 12

OTHER AUTHORITIES AND ARTICLES

Annotation, "Rights and Remedies of Parents Inter Se With Respect To The Names of Their Children," 92 A.L.R. 3d 1091 (1979)..... 6

MacDougall, "Women's, Men's, Children's Names: An Outline and bibliography," 7 Family Law Reporter 4013 (March 17, 1981)..... 4

"What To Call What's-His-Name," (editorial), Virginian Pilot, Jan. 5, 1981, at A-10, col. 1..... 6

AFFIDAVIT

Affidavit of Audrey Davis Saxton in Support of Oral Argument, Petition For Certiorari at 41a, Saxton v. Dennis... 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-959

Audrey Davis Saxton, Mother and Natural Guardian of Robert Lynwood Dennis and Jessica Campbell Dennis, for Statutory Change of Their Names to Robert Lynwood Saxton-Dennis and Jessica Campbell Saxton-Dennis,

Petitioner,

-v.-

Fredrick H. Dennis,

Respondent.

REPLY OF PETITIONER TO RESPONSE OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

STATEMENT AND SUMMARY OF ARGUMENT

The Respondent has asked that the Petition For A Writ of Certiorari be dismissed for essentially three reasons: 1) that there are no substantial constitutional issues involved; 2) that the decision of the Minnesota Supreme Court is supported by independent and adequate state grounds and would not be different even if this Court were to correct the state court's view of the federal constitutional questions; and, indirectly 3) that he is financially unable to bear the costs of adequate legal representation.

This case, involving the very natural and basic right of people to name their children, will be, if heard by this Court, one of the major sex discrimination cases of the Term, if not the major case in the area. Likewise, as a case involving minors' rights to bear names which are truly in their best interests, it will have nationwide impact. The purpose of this reply is to impress upon this Court, to the extent possible, the dire need for firm guidance to the courts of this country in the area of children's names, guidance which the courts did not get with women's names[1] and which, far moreso than with women's names for which there was solid common law precedent

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1 Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), aff'd. per curiam, 405 U.S. 970 (1972).

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to support their right to name themselves, is exigent.

This case involves substantial federal questions and is the appropriate and timely case for the United States Supreme Court to review the same. The same judgment would not be rendered by the Minnesota Supreme Court if the Court will correct the state court's view that breaking a tie between parents in favor of the male does not violate women's and children's constitutional rights to equal protection and due process. Even if the result would or could be the same after correction on the constitutional questions, however, this Court has not shied from adjudicating constitutional rights even if such adjudication does not finally resolve the controversy. Orr v. Orr, 440 U.S. 268 (1979); Stanton v. Stanton, 421 U.S. 7, 17 (1975).

The fact that both Ms. Saxton and Mr. Dennis are both indigent/financially unable to bear the cost of United States Supreme Court litigation and have been/are represented by attorneys working pro bono[2] should have no bearing on vindicating important constitutional rights. Law making cases which affect many people, including numerous names cases[3] are often organizationally funded,

---

[2] Affidavit of Audrey Davis Saxton in Support of Oral Argument, Petition For Certiorari at 4la, Saxton v. Dennis.

[3] E.g., Allen v. Lovejoy, 533 F. 2d 522 (6th Cir. 1977). Efforts to procur attorneys' fees and back pay for the plaintiff who had to litigate her suspension without pay for not changing her surname when she married met with scant success. Allen v. Shelby County, No. C-75-118 (W.D.Tenn. 1978); Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W. 2d 458, 67 A.L.R. 3d 1249 (1975); Stuart v. Board of Supervisors, 266 Md.440, 295 A. 2d 223 (1972).

supported by amici and/or done pro bono by attorneys dedicated to making this society a fairer place to live. Counsel can and should be appointed by the Court to defend the position that children's names should not be changed over the objection of the father irrespective of a determination that the children's best interests would be served by either the mother's and children's choice of name (a hyphenated surname incorporating both parents' names) or the father's(choice of) name (his name only). If the Minnesota Supreme Court can simply ignore all the precedents of the United States Supreme Court in a case so obviously gender based, to the detriment of children, so can all other state courts which are continually finding the issue of children's names and parental rights with respect thereto before them as a logical outgrowth of the successful efforts to procur women's right to name themselves. See MacDougall, "Women's, Men's, Children's Names: An Outline and Bibliography," 7 Family Law Reporter 4013 (March 17, 1981).

ARGUMENT

I.

This case involves substantial federal questions about which state and federal courts in every state need immediate guidance as courts nationwide grope with the issues involved in naming children and flounder and conflict in their decisions with respect thereto

Preliminarily, this case must be approached honestly. It does not take a detective to discern the Minnesota Supreme Court's intent in deferring to the name "borne for an extended period of time" in breaking a tie[4] between parents in a dispute involving their children's names. There is no time or room for rationalization. The deference is a thinly disguised mandatory preference for the male (choice of) name. The Minnesota Supreme Court could hardly have spoken with greater clarity unless it were to have come right out and said what it, and the courts below it, tried so hard to deny and circumvent because of the obvious discrimination involved: that where the father wants his name to be used by his marital children, best interests of the children notwithstanding, the father's choice of name prevails unless the father has so disgraced his name[5] and/or abandoned his children

---

[4] "the trial court did not abuse its discretion by concluding the children's best interests were served by keeping their given surname. The evidence, however, would also have supported a contrary finding." Saxton v. Dennis, 309 N.W. 2d 298 , 301 (Minn. 1981).

[5] See, e.g. Petition of Christjohn, 428 A. 2d 597 (Pa. Super. 1981) (natural father had murdered stepfather to whose name child was changing).

and paid no child support, that he has forfeited his "natural" or "primary" right to have his children bear his (choice of) name.

This is the traditional judicial standard for treating parental disagreement over the naming of children. Annotation, "Rights and Remedies of Parents Inter Se With Respect To The Names of Their Children," 92 A.L.R. 3d 1091 (1979). Robinson v. Hansel, 302 Minn. 34, 223 N.W. 2d 138 (1974). Because of the reality that judicial pronouncement against this traditional protection of male power and the patronymic naming system is not the kind of decision which makes judges popular,[6] without guidance by the United States Supreme Court, state courts dealing with the issue will continue to flounder and conflict and are more likely to follow the Robinson v. Hansel/Saxton v. Dennis preference for the male right[7] than the California Supreme Court's overruling of all such caselaw in In re Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 918, 620 P. 2d 579 (1980) so as to render it a practical impossibility for women who, like

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[6] As one newspaper editorialized on Schiffman:

> Sure it smacks of discrimination to require that a woman assume her husband's surname upon marriage and that the children she bears also go by her husband's name. But it is tidy. In a culture that developed as a male-dominated society, it was natural that the family name follow the male line of descent...why don't we leave well enough alone and hope the California Supreme Court ruling becomes a forgotten footnote in legal history?"

"What's To Call What's-His-Name," Virginian Pilot, Jan. 5, 1981, at A10, col. 1.

the Petitioner, have reverted to their birth given surnames after first using their spouses' names as their own and naming their marital children with the same, to have any say in naming their children.

The result of the mandatory preference imposed by the Minnesota Supreme Court will be to perpetuate this country's patronymic naming system and male control over women and children. The Minnesota Supreme Court's denial of Petitioner's constitutional claims is in direct violation of this Court's clear precedent and condemnation of gender based discrimination which can only be vindicated by the Court.

A.

Where there is a determination that children's best interests will be equally served by the mother's (and children's) choice of name or the father's (choice of) name, a deference to the father's name denies the mother, a woman, equal protection of the laws in direct contradiction to the precedents of this Court

The preference in this case is gender based discrimination akin to the very first case this Court decided in a long line of sex discrimination cases over ten years ago. Reed v. Reed, 411 U.S. 71 (1971). Reed involved a

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[7] Compare Stull v. Nash, ___ S.C. ___, 280 S.E. 2d 209 (1981) and Application of Tubbs, 620 P. 2d 384 (Okl. 1980) to In re M.L.P., 621 P. 2d 430 (Tex. Civ. App. 1981).

statute which provided that as between equally entitled persons males were to be prefereed to females in the administration of their children's estates. It was invalidated by this Court. A deference to the male's (choice of) name to break a tie between men and women in the naming of their children is no less a violation of equal protection than was the mandatory preference adjudicated unconstitutional in Reed v. Reed over ten years ago. To let it stand would be to go against that many years of precedent by this Court.

B.

The imposition of an impossible and insurmountable burden of proof to overcome the preference for the father's (choice of) name violates a woman's right to equal protection and due process of the laws in direct contradiction to several rulings of this Court invalidating unequal gender based burdens

The burden of proof women are saddled with by the Minnesota Supreme Court below following Robinson v. Hansel, supra, is more onerous than the burdens this Court has struck down time and time again as violative of equal protection starting with Frontiero v. Richardson, 411 U.S. 688 (1975). Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980). This Court has invalidated such "tidy" and "convenient" means of resolving situations. To let the Minnesota Supreme Court ignore the constitutional

ramifications of such a discriminatory burden of proof will be to close the courthouse doors at least in Minnesota to women seeking to change their children's surnames over the father's objection unless, under the traditional "tests" for assuring continuation of the entrenched male naming power, the father is guilty of gross misconduct such as murdering the person to whose name the mother seeks to change the child's.[8] Minnesota has now twice refused to accept a woman's right to participate in the naming of children in her custody over the objection of the father. Without the intervention of this Court the courts of Minnesota are closed to such women as Petitioner.

C.

Deference to the father's (choice of) name does not substantially relate to the important governmental interest of guaranteeing that children's best interests are served, and is therefore in direct violation of the equal protection principle as articulated in numerous decisions of this Court

The constitutional test for determining gender based discrimination is clear, and a preference for the father's (choice of) name to break a tie between disagreeing parents is not likely to survive it if analyzed by this Court. As summarized succinctly in Wengler v. Druggists Mutal Ins. Co., supra:

> our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory

> means employed must be substantially related to the achievement of those objectives. Califano v. Westcott, 443 U.S. 76, 89, 99 S. Ct. 2655, 2663, 61 L. Ed. 2d 382 (1979); Orr v. Orr, 440 U.S. 268, 279, 99 S. Ct. 1102, 1111, 59 L. Ed. 2d 306 (1979); Califano v. Webster, 430 U.S. 313, 316-317, 97 S. Ct. 1192, 1194, 51 L. Ed. 2d 360 (1977); Craig v. Boren, 429 U.S. 190, 197, 97 S. Ct. 451, 456, 50 L. Ed. 2d 397 (1976).

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150.

A preference for the father's (choice of) name is not even remotely related, let alone substantially related, to promoting the best interests of the children, supposedly the raison d'etre of the discriminatory classification. The lack of recognition by the Minnesota Supreme Court of the constitutional standard by which it should evaluate a preference for the father's choice of name just ignores years of precedent by this Court.

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[8] Petition of Christjohn, supra.

II.

The case of Audrey Davis Saxton on behalf of the two children in her custody, Robert and Jessica, is the appropriate case for the United States Supreme Court to review the important federal questions involved

As purveyed in the Petition For Certiorari, the issue of a woman's right to name her children on an equal basis as men, is one which is arising all over the country. It is a potential issue in every divorce/custody action. State courts everywhere are groping with the issue in the light of the now almost universally recognized fact that married and divorced women have the right to determine their own names. As custodial parents of their children women now expect to be treated not as babysitters of male property, branded with the male name, but as fully responsible and mature heads of household with no exception carved out for the naming of their children. Courts are being faced with the situation as never before.

It would be difficult to find another case where the facts are so well articulated for the necessary thorough review of the constitutional issues involved.

Ms. Saxton was married when women's right to simply not change their own names for all purposes was not at all articulated in this country. Indeed, at this writing the Alabama Supreme Court has yet to articulate that the

conceded view of the common law in Forbush v. Wallace, supra (that the common law, adopted by Alabama, required a woman to take her husband's name as her "legal" name) was and is a misstatement of the law of that state. Kentucky's Department of Transportation only capitulated in October, 1981 to issuing drivers' licenses to married women in their own names over the precedent of Whitlow v. Hodges, 539 F. 2d 582 (6th Cir. 1976), cert. denied, 429 U.S. 1029, 97 S. Ct. 654 (1976) which followed Forbush.[9]

Minnesota acknowledged married persons' right to determine their own names at marriage statutorily in 1975.[10] Before that, however, lawsuits had to be brought simply for women to vote in their own names in Minnesota.[11] The Petitioner married in the 1960's and gave birth to her children in West Virginia before Forbush had even been summarily affirmed by this Court, the first in the line of modern cases on name retention, Stuart v. Board of Supervisors, supra, had not even been rendered, and name rights had not yet been made a social issue.

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[9] Memorandum, Kentucky Department of Transportation, Oct. 30, 1981.

[10] Minn. Stat. sec. 517.08 (1980).

[11] Kinder v. Schwarzkopf, No. 703509 (Distr. Ct., Hennepin County, Order For Dismissal, Oct. 21, 1974).

Petitioner's right to her own name was not a certainty when she married and gave birth to her children. She did not know she could keep her own name let alone determine her children's names. Any court in this country should easily take judicial notice of the fact that a woman's right to name her children with her name when it differed from her husband's was not even fathomable in those days. It just barely is now. At this writing only a handful of courts have yet dealt with at birth naming of children where parents are in disagreement and mother has custody and uses her own name. Jacobs v. Jacobs, 309 N.W.2d 303 (Minn. 1981); In re Schiffman, supra; In the Interest of M.L.P., supra; Hurta v. Hurta, 25 Wash. App. 95, 605 P. 2d 1278 (1979).

Furthermore, the Petitioner divorced her husband in West Virginia in 1975 where the statute gave no jurisdiction to courts to change a woman's name pursuant to the divorce if she had custody of the children,[12] and later changed her name back to her birth name in a statutory proceeding in Hennepin County, Minnesota. Courts in several states have been and still are reluctant to even grant married and divorcing women's petitions to change

[12] See In re Harris, 236 S.E. 2d 426 (W.Va. 1977).

their surnames pursuant to statutes providing for name change at divorce. Women have actually had to appeal lower courts' refusal to change their names because the children in their custody would bear a different surname, as late as 1981! May v. May, 626 P. 2d 801 (Kan. App. 1981); In re Marriage of Dorks, 98 Ill. App. 3d 1046, 425 N.E. 2d 49 (1981); In re Marriage of Thomas, ___Ill. App. 3d___, 427 N.E. 2d 1009 (1981).

The Petitioner before this Court is typical of the victims of prejudice and discrimination against women determining their own names. "Caught between a rock and a hard place," first having to fight and litigate simply to not change their names, or to change them if they had children or might have children,[13] they are now being slapped in the face again by being told that it is only right that they be denied participation in the naming of the children in their custody over the fathers' objection because they consented to naming the children with the father's name in the first place!

Petitioner seeks simply to have her children bear a hyphenated surname of both their parents' birth names. The children want the combination name and the Minnesota Supreme Court has said that either the mother's and children's choice of name or the father's

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[13] See, e.g. Kruzel v. Podell, supra.

choice of name is in the children's best interests. The father objects because his son is his "only male heir." The Minnesota Supreme Court, in a divided opinion, breaks the tie by a deference to the father's surname.

Petitioner requests that her and her children's rights be given the chance to be fully briefed, argued and deliberated upon by the United States Supreme Court. This Court has more than once articulated that the classifications which reflect "the baggage of sexual stereotypes"[14] do not pass constitutional muster. If women have no right to determine their children's names over the objection of the fathers, they are being put not even "on a pedestal, but in a cage." Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

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14 Orr v. Orr, supra.

CONCLUSION

The United States Supreme Court should give this case a chance to be heard.

Respectfully submitted.

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March, 1982